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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. T-00000A-97-0238 **NOTICE OF FILING**

Staff of the Arizona Corporation Commission ("Staff"), through its undersigned attorneys, hereby files its Final Report on Qwest's Performance Assurance Plan.

RESPECTFULLY SUBMITTED this 24 day of December 2001.

for Christopher C Kempley

Maureen A. Scott
Attorney, Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007
Telephone: (602) 542-6022
Facsimile: (602) 542-4870
E-mail: maureenscott@cc.state.az.us

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Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

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Copies of the foregoing were mailed and/or hand-delivered this 24 day of December, 2001, to:

S legal mai maureen pleading 97238NOF PAP fnl rpt

Charles Steese
Andrew Crain
QWEST Communications, Inc.
1801 California Street, #5100
Denver, Colorado 80202

Maureen Arnold
QWEST Communications, Inc.
3033 N. Third Street, Room 1010
Phoenix, Arizona 85012

Michael M. Grant
GALLAGHER AND KENNEDY
2575 E. Camelback Road
Phoenix, Arizona 85016-9225

Timothy Berg
FENNEMORE CRAIG
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85016

Nigel Bates
ELECTRIC LIGHTWAVE, INC.
4400 NE 77th Avenue
Vancouver, Washington 98662

Brian Thomas, VP Reg. - West
Time Warner Telecom, Inc.
520 SW 6th Avenue, Suite 300
Portland, Oregon 97204

Richard P. Kolb, VP-Reg. Affairs
OnePoint Communications
Two Conway Park
150 Field Drive, Suite 300
Lake Forest, Illinois 60045

Eric S. Heath
SPRINT COMMUNICATIONS CO.
100 Spear Street, Suite 930
San Francisco, CA 94105

Thomas H. Campbell
LEWIS & ROCA
40 N. Central Avenue
Phoenix, Arizona 85007

Andrew O. Isar
TRI
4312 92nd Avenue, N.W.
Gig Harbor, Washington 98335

Michael W. Patten
Roshka Heyman & DeWulf
One Arizona Center
400 East Van Buren, Suite 800
Phoenix, Arizona 85004

Charles Kallenbach
AMERICAN COMMUNICATIONS SERVICES INC
131 National Business Parkway
Annapolis Junction, Maryland 20701

Thomas F. Dixon
MCI TELECOMMUNICATIONS CORP
707 17th Street, #3900
Denver, Colorado 80202

Kevin Chapman, SBC
Director-Regulatory Relations
5800 Northwest Parkway
Suite 125, Room 1-S-20
San Antonio, TX 78249

Richard S. Wolters
AT&T & TCG
1875 Lawrence Street, Room 1575
Denver, Colorado 80202

Joyce Hundley
UNITED STATES DEPARTMENT OF JUSTICE
Antitrust Division
1401 H Street NW, Suite 8000
Washington, DC 20530

Joan Burke
OSBORN MALEDON
2929 N. Central Avenue, 21st Floor
P.O. Box 36379
Phoenix, Arizona 85067-6379

Scott S. Wakefield, Chief Counsel
RUCO
2828 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004

Lyndon J. Godfrey
Vice President – Government Affairs
AT&T
111 West Monroe St., Suite 1201
Phoenix, Arizona 85004

Daniel Waggoner
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

Raymond S. Heyman
Randall H. Warner
ROSHKA HEYMAN & DeWULF
One Arizona Center
400 East Van Buren, Suite 800
Phoenix, Arizona 85004

Diane Bacon, Legislative Director
COMMUNICATIONS WORKERS OF AMERICA
5818 North 7th Street, Suite 206
Phoenix, Arizona 85014-5811

Gena Doyscher
GLOBAL CROSSING LOCAL SERVICES, INC.
1221 Nicollet Mall
Minneapolis, MN 55403-2420

Karen L. Clauson
ESCHELON TELECOM, INC.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402

Mark P. Trinchero
Davis, Wright Tremaine
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201

Traci Grundon
Davis, Wright & Tremaine LLP
1300 S.W. Fifth Avenue
Portland, OR 97201

Bradley Carroll, Esq.
COX ARIZONA TELCOM, L.L.C.
20401 North 29 Avenue
Phoenix, AZ 85027

Mark N. Rogers
EXCELL AGENT SERVICES, L.L.C.
2175 W. 14th Street
Tempe, AZ 85281

Barbara P. Shever
LEC Relations Mgr.-Industry Policy
Z-Tel Communications, Inc.
601 S. Harbour Island Blvd., Suite 220
Tampa, FL 33602

Jonathan E. Canis
Michael B. Hazzard
Kelly Drye & Warren L.L.P.
1200 19th Street, NW, Fifth Floor
Washington, D.C. 20036

Ms. Andrea P. Harris
Sr. Manager, Reg.
ALLEGIANCE TELECOM, INC.
2101 Webster, Suite 1580
Oakland, California 94612

Dennis D. Ahlers, Sr. Attorney
Eschelon Telecom, Inc.
730 Second Ave. South, Ste 1200
Minneapolis, MN 55402

Garry Appel, Esq.
TESS Communications, Inc.
1917 Market Street
Denver, CO 80202

Todd C. Wiley Esq. for
COVAD Communications Co.
GALLAGHER AND KENNEDY
2575 East Camelback Road
Phoenix, Arizona 85016-9225

K. Megan Doberneck, Esq. for
COVAD Communications Co.
7901 Lowry Blvd
Denver, CO 80230

Viola R. Kizis
____
Viola R. Kizis
Assistant to Maureen A. Scott

IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION

ACC Docket No. T-00000A-97-0238

STAFF'S FINAL REPORT ON

QWEST'S PERFORMANCE ASSURANCE PLAN

December 14, 2001

I. FINDINGS OF FACT

A. INTRODUCTION

1. The Telecommunications Act of 1996 ("1996 Act") provided a method by which Regional Bell Operating Companies may receive Section 271 approval and enter the interLATA long distance market. The 1996 Act conditions such approval on the opening of local markets to competition. The Federal Communications Commission ("FCC") has emphasized the importance of four key components of any Section 271 filing: 1) open participation of all interested parties, 2) independent third party testing of operation support systems ("OSS"), 3) design of performance measurements and standards, and 4) adoption of performance assurance measures which create a financial incentive for post-entry Section 271 compliance.[1] Qwest's Performance Assurance Plan ("PAP") addresses the fourth component of the Section 271 process.

2. The development of a PAP is a serious undertaking. Any incumbent local service carrier has a clear economic incentive to stave off competition.[2] Due to this fact, the FCC encourages the monitoring of a Bell Operating Company's ("BOCs") wholesale performance through the development of a post-entry wholesale performance assurance plan.[3]

3. This Staff Report provides an overview of the PAP process for Qwest Corporation ("Qwest") [4] in Arizona, the positions of Workshop participants, resolutions reached between the parties, a summary of impasse issues including the parties' positions on each, and Staff's impasse resolution proposals.

B. PROCEDURAL HISTORY

4. A total of seven workshops on the Arizona PAP were held in 2000 and 2001. Issues relating to the PAP were discussed and presented at each workshop. All interested parties were invited to participate.

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[1] Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, CC Docket 99-295, at para 8 (December 22, 1999) (Bell Atlantic New York Order).

[2] See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2119 (1997) ("the blockade position of the local monopolists is such that they would have every incentive to guard access to their networks against would–be competitors").

[3] Bell Atlantic New York Order at paras 429-30; Application of Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Communications Act to Provide Inter-LATA Service in the State of Texas, Memorandum Opinion and Order, CC Docket No. 00-65 at para 420 (2000) (hereinafter, "SBC Texas Order").

[4] For simplicity purposes, this Staff Report's references to "Qwest" shall mean "Qwest and its assignees or successors."

5. On July 13, 2000, the first Workshop on the PAP took place at the Commission's offices in Phoenix. The Arizona Corporation Commission ("ACC") Staff, Commission consultants - Doherty & Company ("DCI"), and Qwest were present at the Workshop. The following CLECs were in attendance: Alltel, GST, WorldCom, Z-Tel, SBC Telecom, Southwestern Bell Telecom, Eschelon Telecom, Inc., Electric Lightwave, Inc., Cox Arizona Telecom, Inc., and e·spire Communications. The Residential Utility Consumer Office ("RUCO") was also present.

6. On July 25 and 26, 2000, the second Workshop on the PAP took place at the Commission's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, Eschelon Telecom, Inc., Electric Lightwave, Inc., and Alltel. WorldCom, Z-Tel, and Eschelon Telecom, Inc. were present telephonically. RUCO was also present.

7. On August 22 and 23, 2000, the third Workshop on the PAP took place at the Commission's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, Eschelon Telecom, Inc., Electric Lightwave, Inc., SBC Telecom, Southwestern Bell Telecom, Pac-Tel, and Alltel. Pac-Tel and Eschelon Telecom, Inc. were present telephonically. RUCO was also present. Kelley Drye & Warren LLP were present telephonically.

8. On October 17 and 18, 2000, the fourth Workshop on the PAP took place at Owest's office at 5090 North 40th Street in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, and SBC Telecom. Cox Arizona Telecom, Inc. ("Cox") and e·spire Communications ("e-spire") were present telephonically for the first day of the workshop.

9. On December 18 and 19, 2000, the fifth Workshop on the PAP took place at the Commission's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, SBC Telecom, and Covad. RUCO was also present.

10. On February 5 and 6, 2001, the sixth Workshop on the PAP took place at Hewlett Packard's ("HP") offices in Phoenix. The ACC Staff, DCI, and Qwest Corporation ("Qwest") were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, SBC Telecom, and Sprint Communications Company ("Sprint"). The U.S. Department of Justice ("DOJ") was also present.

11. On April 2 and 3, 2001, the seventh and final Workshop on the PAP took place at HP's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, and SBC Telecom. Cox participated telephonically.

C. FCC PUBLIC INTEREST ANALYSIS

12. There is no express requirement in Section 271 that a BOC be subject to a Performance Assurance Plan. The FCC does not require such plans and therefore the FCC does not impose requirements for its structure if a State adopts one. Nonetheless, it is a critical consideration in assuring that the local market will remain open after Qwest receives section 271 authorization. The existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.

13. The FCC has offered the following basic PAP components as guidelines: (1) penalties linked to effective performance measures that can be expanded as necessary; (2) a clear and detailed enforcement structure that mainly relies on self-executing penalties; and (3) a process for validating and auditing the performance results.[5] There is no single PAP which all states must institute.[6] Therefore, each state has at its discretion the crafting of a suitable PAP.[7]

D. POSITION OF QWEST

14. In September, 2000 Qwest submitted a modified PAP which was patterned after the PAP submitted by Southwestern Bell for the State of Texas and approved by the FCC. At the time Qwest stated that it believed that the Commission, CLECs and the Company could avoid unnecessary controversy and depletion of resources in attempting to create a PAP from scratch.

15. The modified Qwest PAP adopted virtually the same payment structure and key statistical and payment schedules as the Southwestern Bell Texas PAP. The Qwest PAP requires specified levels of wholesale performance as determined by the performance measures (Performance Indicator Definitions "PIDs") and assesses financial liability for failure to meet the standards.

16. The modified Qwest PAP included key measurements agreed to in the Arizona Workshops and the Regional Oversight Committee ("ROC") workshops. In its revised PAP, Qwest included thirty-one of the fifty-one ROC/Arizona PIDs. Of the twenty not included, Qwest stated that fourteen were diagnostic or parity by design. Qwest stated that as such, they are not appropriate for inclusion in a PAP. Qwest stated that the remaining six measurements were not included because they were not requested by the CLECs in the Arizona 271 workshops or because they were duplicative of other measurements included in the Qwest PAP. Qwest further stated that it had previously responded to the CLECs expressed concerns over the number of sub-measurements by agreeing at the last workshop to add 94 additional sub-measurements. With this filing, Qwest is increasing the number of sub-measurements included in the PAP to 471.

[5] See Bell Atlantic New York Order at paras 437-444.
[6] Compare, e.g., Bell Atlantic New York Order at paras 431-443 with SBC Texas Order at paras 422-30.
[7] See SBC Texas Order at para. 423 (reviewing under a "zone of reasonableness" standard).

17. Qwest further stated that its revised PAP contained a two-tiered, escalating and self-executing remedy structure. Similar to the Texas plan, the measurements are designated as Tier I, Tier II or both Tier I and Tier II. Tier I payments to CLECs are triggered immediately the first month that Qwest fails to meet a measurement standard and escalate according to the degree to which the parity or benchmark standard for a particular measurement is missed, the duration of non-conforming performance and the weight assigned to the particular measurements. Qwest stated that under its revised Plan, dollar amounts are assigned to Tier I measurement to be paid on a per occurrence basis, or in a few instances on a per measurement basis. The dollar amounts increase with the designation from "low" to "medium" to "high". For the vast majority of Tier I measurements, the assigned dollar amount is multiplied by the number of occurrences needed to bring the measurement result to parity or the agreed to benchmark. Thus, CLEC payments escalate the further away the Qwest performance is from the designated measurement standard. Finally, the payment amount increases each of the first 6 months for which the results are non-conforming.

18. Qwest's revised PAP also includes Tier II remedies payable to a State Fund. Tier II payments are triggered automatically after three consecutive months of non-conforming service results. Dollar amounts are assigned to Tier II measurements on a per occurrence or per measurement basis. The dollar amounts increase with the designation from "low" to "medium" to "high". For the vast majority of Tier II measurements, Qwest stated that the amount of payment increased the further performance is from the designated measurement standard.

19. The parity standard is used when there is a retail analog. The parity standard is met when the service Qwest provides to CLECs is equivalent to that which it provides to its retail customers.[8] Qwest proposed a statistical test, namely the modified "Z-test", for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals) or two percentages (e.g., Qwest and CLEC proportions), to determine whether a parity condition exists between the results for Qwest and the CLECs. Qwest stated that the modified "Z-test" would be applicable if the number of data points are 30 or more. For testing measurements for which the number of data points are 30 or less, Qwest proposed using a permutation test to determine the statistical significance of the difference between Qwest and the CLEC. Qwest would be in conformance when the monthly performance results for parity and benchmark measurements are such that the calculated Z test statistics are not greater than the Critical Z-values. Certain measures have no retail analog to make parity comparisons with. These measures have been assigned benchmarks and are evaluated on a stare and compare basis.

20. Qwest's revised PAP puts at risk 36% of the Company's "net revenues" derived from the local exchange services.

[8] For performance measurements that have no Qwest retail analogue, agreed upon benchmarks are used. Because variation may occur around the benchmark, a statistical test is used to determine whether the variation is within a statistical range.

21. Qwest stated that its revised PAP incorporates performance measurements that will ensure Qwest's service performance to competitors can be measured and monitored so that any degradation of the agreed upon level of service is detected and corrected.

22. Qwest also stated that the performance measurements incorporated into the Qwest PAP are broad based enough to cover all the modes of entry, resale, interconnection and the purchase of unbundled network elements.

E. POSITION OF THE CLECS

23. Z-Tel originally proposed a competing PAP, called the Zone Parity approach. The Zone Parity approach is a non-statistical plan which Z-Tel claimed was easy to understand and implement and its results were easy to interpret.

24. Z-Tel identified the following objectives for any PAP: 1) the PAP should ensure that the quality of services provided to the CLECs by the ILEC is "just, reasonable, and nondiscriminatory" and "...at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party..."; 2) the measurement procedures of the PAP should be easy to understand, calculate and interpret and should minimize administrative cost; 3) the plan should be competition- or customer-focused and promote reasonable expectations about the quality of service the ILEC will provide CLECs; 4) the measurement procedures should be credible, and based on accurate and reliable data; and 5) the plan should be broadly consistent with the plentitude of underlying principles offered by the various participants and State and Federal regulatory agencies.

25. Z-Tel claimed that its Zone Parity proposal was superior to other PAPs because it did not rely on statistical approaches to performance measurement. Statistical procedures, while routine and comprehensible to statisticians, are inordinately complex for the statistical layperson. In addition, Z-Tel states that as long as the ILEC is providing the same level of service quality to itself and the CLECs, performance is deemed adequate under the statistical approach. However, statistically identical service may be neither "just" or "reasonable". According to Z-Tel if the ILEC's service quality is reduced, the statistical approach will not detect it as long as everyone receives the same poor service.

26. Z-Tel argued, therefore, that its approach was superior because of the inability of the statistical approach to capture absolute performance. This is a serious shortcoming because CLECs are harmed relatively more than ILECs for a given "parity" reduction in the quality of service. The CLEC business plan relies on convincing customers to switch from the services of the ILEC to those of the CLEC.

27. Benchmarks, according to Z-Tel, do not suffer from this flaw. By setting an absolute level of quality, the ILEC is unable to increase the costs of switching with a "parity' reduction in quality. Z-Tel claimed that its Zone Parity benchmarks, because

they are based on actual performance data, consider both the relative and absolute quality dimensions of performance.

28. SBC also proposed a PAP that was almost identical to the Texas plan.

29. On September 25, 2000, WorldCom, Eschelon Telecom ("Eschelon") and Electric Lightwave filed a separate joint proposed PAP ("Joint CLEC PAP"). The Joint CLEC PAP which also proposed the use of "zone benchmarks" in the application of performance measurements. The zone benchmark standards would be gradually raised over time.

F. QWEST'S RESPONSE

30. Qwest opposed the Zone Parity approach and the Joint CLEC PAP which was also based upon the use of zone benchmarks. Qwest claimed the Joint CLECs' attempt to convert parity performance measurements into benchmark measurements for the purposes of calculating PAP payments is a clear departure from the requirements of the Telecommunications Act and is unacceptable. Qwest stated that central to the concept of discrimination is the comparison of service provided to CLECs to service provided to Qwest retail customers during the same time period. Qwest argued that the Joint CLECs' zone proposal would result in a level of payment that would not relate to the level of discriminatory conduct.

31. Qwest also argued that the Joint CLEC proposal did not provide the concrete details regarding their zone proposal, specifically the zone benchmarks for each performance sub-measurement.

32. Qwest also claimed that the Joint CLEC zone proposal added unnecessary complexity and was not necessary to discourage discrimination.

33. Qwest claimed that other critical and controversial elements missing from the Joint CLEC proposal are: 1) the probability of detection that Qwest believes it would be subject to, 2) the discount rate that Qwest would use in decision making, 3) the number of years Qwest expects to retain each type of customer due to an act of discrimination, 4) the scale value representing the visibility of each performance sub-measurement to the customer, and 5) the number of customers indirectly affected by an act of discrimination.

34. With regard to the SBC Plan, Qwest commented that Qwest had already adopted the key plan structure, statistical methods, and payment tables from the Texas plan for the Qwest PAP. Therefore, Qwest stated that Qwest's and SBC's proposals have many common elements and are generally similar. However, Qwest noted that SBC would have the Commission adopt the Texas performance measurements. Qwest stated that it strenuously opposes the adoption of new performance measurements. Qwest states that SBC would have the Commission throw out the entirety of the PIDs developed in the

Arizona performance workshops and substitute the Texas performance measurements. In this regard, Qwest stated that the SBC proposal is unreasonable.

G. SUMMARY OF QWEST'S PROPOSED PAP[9]

35. The parties involved in this proceeding agreed at the fifth PAP Workshop to use the PAP approved by the FCC in SBC Telecom, Inc.'s 271 application in Texas as a foundation.[10] Qwest's proposed *Performance Assurance Plan* ("PAP"), which is based on the SBC Texas plan, is summarized below. Throughout the workshop process, Qwest has revised and modified its proposed PAP. In this summary, Staff will describe the PAP using Qwest's most recently submitted proposal filed on July 6, 2001.

Performance Measurements

36. Under Qwest's proposed plan, Qwest's wholesale performance will be evaluated on twenty-two separate performance measures. Each of these measures is divided into several sub-measures to account for differences in product types and/or geography. The pass/fail criteria on some performance measures is whether Qwest's wholesale performance is at parity with its retail performance. For measures which do not have a "retail analog", benchmarks have been established as pass/fail criteria. The development of the performance measures is discussed below in Section H.

37. Penalty payments under Qwest's proposed PAP are divided into two categories or "tiers". The performance measurements which are evaluated in the PAP are placed in either or both of these tiers. Tier I payments are made by Qwest to individual CLECs if a performance measure in this category is missed. Data is reviewed at the individual CLEC level in order to assess Tier I payments. Tier II payments are based on aggregate CLEC results. If a measure is missed at an aggregate CLEC level for three consecutive months, then Qwest would make a Tier II payment. Tier II funds do not go to individual CLEC s. There are differing ideas as to the destination of Tier II payments. These ideas are discussed in Section I, DISPUTED ISSUE NO. 12.

38. Some measures are categorized as only Tier I. Many measurements are categorized as Tier I and Tier II. This indicates that Qwest will be measured for its performance at an individual CLEC basis and at an aggregate level. For these measures, a Qwest failure at meeting both of these standards could result in two types of payments.

39. Each of the evaluated performance measures are given different weights: High, Medium, or Low. These weights indicate the relative importance of the measure in ensuring competitive local services in Arizona. Initially, Qwest utilized the weighting in the Texas PAP and made changes based on comments or concerns raised in the Arizona proceeding. The level of payment that Qwest provides depends on the weight given to

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[9] In the initial Staff Report docketed on October 29, 2001, Section G was mislabeled "Resolved Issues." Relabeling Section G should resolve many of WorldCom's issues regarding the initial Staff report paragraphs 38 through 45.

[10] See transcript for PAP Workshop 5 held on December 18, 2000, Volume I pages 119 – 122.

the performance measure. Qwest will be required to pay a greater penalty on missed measures with a High weighting than for Medium or Low. The Medium weighting would then receive the next highest level of payment, with Low weighting receiving the lowest level.

40. Penalty payments are determined in one of two ways: per occurrence or per measurement. Per occurrence payments are calculated using a set dollar payment and multiplying it by the number of occurrences of failure. Per measurement payments are calculated using a set payment level for a measurement at a particular weighting level. Table 3 in this report presents the payment levels associated with these two methods of payment. The payment levels for both of these methods increase as the number of consecutive failures increase.

41. There are two types of standards used in determining whether Qwest failed or passed a performance measurement. The first type of standard is called "parity". If a Qwest performance measure has a parity standard, then Qwest must provide wholesale service that is at the same level (statistically) as Qwest's retail service. The second type of standard is called a "benchmark." Benchmark standards are used for performance measures for which there is no retail equivalent. Benchmarks give a certain standard (e.g., 95% of firm order commitments in less than 20 minutes, etc.) which Qwest must meet in order to pass a performance measure with a benchmark.

42. Some performance measurements have a "diagnostic" standard rather than a parity or benchmark standard. Data is gathered on Qwest's performance on diagnostic measurements. However, Qwest is not penalized based on this performance. Data gathered on these diagnostic measures will be reviewed at a later date to determine whether these measures should be given parity or benchmark standards, making Qwest liable for penalties for failures on these measurements. Currently, there are on-going discussions about converting certain diagnostic measures to benchmark or parity measures.

43. The performance measurements to be evaluated are attached in Appendix A. This attachment gives definitions, standards, weighting, and other details of each measure.

Statistical Analysis

44. In order to determine whether Qwest meets a parity standard, statistical analysis will be used. For a given measure, this analysis compares the mean of wholesale observed data to the mean of observed retail data to determine whether a failure to meet a standard can be deemed statistically insignificant or significant. If the difference in means is determined to be statistically significant, the percent difference between the two means is used to calculate the number of occurrences that are eligible for payments.

45. Measures with benchmarks are evaluated on a "stare and compare" basis with no statistical analysis. For example, performance measure PO-5a requires that firm

order confirmations on certain orders be delivered within 20 minutes 95% of the time. If the data indicate that Qwest has met or exceeded the 95% benchmark, then Qwest makes no payments. If the data indicate that Qwest is below the benchmark, then Qwest will be liable for penalty payments. The number of occurrences that are eligible for payments will be based on the difference between the actual performance and the benchmark.

Other Aspects of PAP

46. Qwest's PAP contains a section regarding the limitations of the plan. This section details how the plan may and may not be used. Qwest also highlights how PAP data will be reported. Qwest mentions that the PAP will be reviewed every six months in order to make changes or modifications to the plan. This review will determine if performance measurements need to be changed, added, or deleted. It will also review the weighting of measures, measurement standards, and payment levels.

H. ISSUES RESOLVED BETWEEN THE PARTIES

47. The parties involved in this proceeding agreed at the fifth Arizona PAP Workshop to use the PAP approved by the FCC in SBC Telecom, Inc.'s 271 application in Texas as a foundation. The Texas PAP contained a provision for six-month reviews of the PAP after it is approved. Parties to the Arizona proceeding agreed to this provision as well. Starting from the Texas PAP, several disputed issues were identified. The parties were able to resolve many of these issues without direct Staff intervention. These resolved issues are discussed and summarized below.

Performance Measurements

48. Prior to the start of the PAP Workshop process, the Arizona Test Advisory Group (TAG) developed its own performance measurements (known as Performance Indicator Definitions or PIDs) for use in the Arizona OSS test.[11] The TAG is made up of Qwest and numerous CLECs, principally WorldCom and AT&T. The Arizona TAG also reviewed the performance measurements adopted in New York and Texas in their development of the Arizona PID. Therefore, the parties to the Arizona PAP Workshops agreed to begin with these measurements rather than the measurements created in the Texas PAP. Additional PIDs may be created or current PIDs modified as requested by parties through the Arizona TAG.

Texas Six-Month PAP Review

49. The Texas PAP called for a review of the PAP after it had been in operation for six months. The first six-month review resulted in many modifications to the Texas PAP. Qwest has agreed to adopt the changes made to the Texas PAP in its first six-month review, with one exception. The exception is that Qwest did not agree to perform root cause analysis after missing a measure for two consecutive months. This

[11] See Appendix A: AZ 271 Working PID

issue will be further discussed in Section I under the title "Disputed Issues and Resolution."

<u>Additional PIDs (PAP-1)</u> [12]

50. In the ROC PAP process,[13] three additional PIDs were agreed to by the participating parties: GA-3 ("Gateway Availability – EB-TA"), GA-4 ("System Availability – EXACT"), and GA-6 ("Gateway Availability – GUI Repair"). Qwest proposed that these be included if they were only classified as Tier II measures. Violation of Tier II measures would result in penalty payments, but not to CLECs. Qwest made this same proposal in the Arizona proceeding. WorldCom agreed to this proposal.

51. CLECs proposed that PID MR-6 ("Mean Time to Restore") be included in the PAP. Qwest and the CLECs came to the following agreement: 1) include MR-3a, MR-3b, MR-3c (MR-3 measures "Out of Service Cleared Within 24 Hours"), MR-6a, MR-6b, and MR-6c for non-designed services; and 2) include MR-3d, MR-3e, MR-5a, and MR-5b (MR-5 measures "All Troubles Cleared Within 4 Hours") for design services. Non-designed services are services which are standard and for which Qwest currently has facilities. Designed services are services for which Qwest must design new facilities in order to provision the service.

52. All parties agreed to include OP-4 ("Installation Interval") and OP-6 ("Delayed Days") as a set of five "families": OP-4a/OP-6-1, OP-4b/OP-6-2, etc. For example, OP-4a and OP-6-1 would both be in the PAP. However, if both measures are missed, Qwest would only make one penalty payment. The penalty payment would be made on the measurement with the highest payment. All parties agreed that OP-3 ("Installation Commitments Met") would stand alone, and not be included in the above "family" concept. However, OP-3 would be included as three families: OP-3a/3b, OP-3c, and OP-3d/e.

<u>Cap Rolling Forward (PAP-6a)</u>

53. Parties agreed that if monthly caps are imposed on the total amount Qwest will pay, then the unused balance would move forward into the subsequent months. Therefore, the cap balance will move forward on a monthly basis until the end of the year.

I. DISPUTED ISSUES AND RESOLUTION

54. Below is a summary of the positions of the parties on the PAP issues that were at impasse at the end of the workshop on April 2-3, 2001. At the last Workshop a

[12] PAP-# refers to the issue number from the original PAP issues log.

[13] The ROC PAP process refers to the Regional Oversight Committee's series of workshops on a PAP. Twelve of the 14 states in Qwest's territory participated in the ROC PAP process (Arizona and Colorado being the exceptions).

briefing schedule was established for the parties to provide their positions on each of these issues. The parties filed Comments on these issues on April 5, 2001; Opening Briefs on May 10, 2001; and Reply Briefs on May 24, 2001. WorldCom was the only CLEC to file comments on April 5, 2001. WorldCom and Z-Tel jointly filed an opening brief on May 10, 2001. WorldCom was the only CLEC to file a reply brief on May 24, 2001.

55. After the Arizona Workshop process was complete, Qwest made several changes to its proposed PAP during the ROC Workshop process. Qwest discussed these changes in its reply briefs and generally offered to include them in the Arizona PAP. To allow the CLECs to comment on Qwest's latest proposal and to allow Qwest to clarify its proposal, another comment cycle was initiated. On July 6, 2001, Qwest filed its proposed Arizona PAP changes based on changes made in the ROC. CLECs responded to these changes on July 26, 2001. Staff filed its Proposed Staff Report on Qwest's Performance Assurance Plan ("Proposed Report" or "Initial Report") on October 29, 2001. Worldcom and Qwest filed comments on the Proposed report on November 8, 2001 and November 9, 2001 respectively. A summary of the parties' positions on each issue is included. Staff follows with its analysis and recommendation on each of the issues.

DISPUTED ISSUE NO. 1: Additional PIDs (PAP-1)

56. There are two main categories for this impasse issue: 1) PIDs PO-6 and PO-7 and 2) PIDs PO-8 and PO-9. Therefore, this section will divide the background, comments, and Staff's resolution in accordance with each of these main categories.

57. PO-6 measures "Work Completion Notification Timeliness." Its purpose is to evaluate the timeliness with which Qwest issues electronic notification to CLECs that provisioning work on an order has been completed and that service is available to the customer.

58. PO-7 measures "Billing Completion Notification Timeliness." Its purpose is to evaluate the timeliness with which electronic billing completion notifications are transmitted to CLECs. This measure focuses on the percentage of orders for which notifications are transmitted (for CLECs) or posted in the billing system (for Qwest retail) within five business days.

59. PO-8 measures the "Jeopardy Notice Interval." Its purpose is to evaluate the timeliness of jeopardy notifications, focusing on how far in advance of original due dates jeopardy notifications are provided to CLECs (regardless of whether the due date was actually missed).

60. PO-9 measures "Timely Jeopardy Notices." Its purpose is to measure the extent to which Qwest notifies customers in advance of jeopardized due dates when original due dates are missed.

a. Summary of Qwest and CLEC Positions[14]

1. PO-6 and PO-7

61. WorldCom and Z-Tel want PO-6 and PO-7 included in the PAP as individual measures. If this is not possible, they suggest including whichever measure will result in higher payments to CLECs. Qwest advocates including PO-6 and PO-7 as a "family." The "family" concept signifies that PO-6 and PO-7 would share a payment opportunity. If Qwest fails to meet the standards for PO-6 or PO-7, Qwest makes one payment. If Qwest fails to meet the standards for both PO-6 and PO-7, then Qwest still only makes one payment.

62. In its Comments filed on April 5, 2001, and its opening brief, Qwest states that including PO-6 or PO-7, but not both, is justified because the PAP provides the CLECs with ample payment opportunities. These payment opportunities exceed the annual profit the CLECs or Qwest receive from business customers.

63. In their comments filed on April 5, 2001, WorldCom, and both WorldCom and Z-Tel in their joint brief state that PO-6 and PO-7 measure different things. The work completion notice is needed so that CLECs know as soon as possible that Qwest has completed the installation. This allows the CLECs to inform their customers about order status. The billing completion notice informs the CLECs of the day that Qwest will stop billing the customer and the date that the CLEC can begin billing the customer. Late or missing billing completion notices can result in customers being double billed. The TAG needs to develop an appropriately defined standard for PO-6.

64. WorldCom states that the Texas PAP does include a measure similar to PO-6. WorldCom would accept including either PO-6 or PO-7 based on which would result in higher payments to the CLECs.

65. In its modifications to the PAP to reflect agreements reached in the ROC process, Qwest has agreed to treat PO-6 and PO-7 as a family in the ROC and makes the same offer here in Arizona. Qwest filed comments on this issue in its filing on the ROC proceeding. Qwest states that in the ROC CLECs agreed to include PO-6 and PO-7 as a "family." PO-6a and PO-7a, PO-6b and PO-7b, and PO-6c and PO-7c would become three "families." Each family is composed of two sub-measures. If Qwest misses both sub-measures in a family, then Qwest would pay a penalty on whichever sub-measure would result in a higher payment.

2. PO-8 and PO-9

66. WorldCom wants PO-8 and PO-9 included as individual measures. Qwest advocates including PO-8 and PO-9 as a "family."

[14] Throughout this report the sections labeled "a. Summary of Qwest and CLEC Positions" contain only a summary of the parties positions, these sections do not represent Staff's position.

67. Qwest states that including PO-8 and PO-9 could make Qwest liable for two payments on one late Jeopardy Notice. Qwest proposes that PO-8 and PO-9 should be included as a "family."

68. WorldCom and Z-Tel state that PO-8 and PO-9 measure different aspects of the process. PO-9 measures the quality of the process while PO-8 measures the timeliness of the process. In its Reply Brief, WorldCom also argued that since PO-8 and PO-9 measure different aspects of the process, WorldCom encourages the Commission to include both measures in the PAP.

69. In the ROC, Qwest agreed to include both PO-8 and PO-9 individually and makes that same offer here in Arizona.

70. WorldCom discusses this issue in its comments on the ROC proceeding. WorldCom agrees that Qwest's ROC proposal, which it is submitting in Arizona, does resolve WorldCom's concerns that both PO-8 and PO-9 be included.

b. Discussion and Staff Recommendation

1. PO-6 and PO-7

71. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff believed that this issue was resolved. Staff agreed that PO-6 and PO-7 should be included as a "family".

72. Comments submitted in response to Staff's initial report did not address this issue. Staff continues to support its prior recommendation.

2. PO-8 and PO-9

73. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff believed that this issue was resolved. Staff agreed that PO-8 and PO-9 should both be included in the PAP. Qwest will be liable for penalties if either measurement standard is missed. If both standards are missed, then Qwest should make payments for each of these measures.

74. Comments submitted in response to Staff's initial report did not address this issue. Staff continues to support its prior recommendation.

DISPUTED ISSUE NO. 2: Change Management (PAP – 2)

75. Changes to Qwest's OSS systems will affect CLECs who depend on those systems. In order to best manage Qwest's changes to its systems, and minimize the negative consequences for CLECs, several change management measures (PIDs) have been suggested.

a. Summary of Qwest and CLEC Positions

76. Qwest stated that it has proposed PO-16 ("Timely Change Management Notifications") and GA-7 ("Timely Outage Resolution Following Software Releases") as diagnostic change management measures for its PAP. Qwest states that these measures should be considered for PAP inclusion during the first six-month PAP review. Qwest states that no additional measures are necessary, but new measures may be considered at the six-month PAP review.

77. WorldCom filed comments on this issue on April 5, 2001 and WorldCom and Z-Tel jointly filed an opening brief on this issue. These parties indicate that Qwest has proposed two change management measures: PO-16 and GA-7. WorldCom and Z-Tel state that an additional change management measure for software validation (PO-6 in New York) should be developed. This software validation measure would measure if the test deck[15] provided to CLECs by Qwest is an accurate reflection of real world scenarios. WorldCom and Z-Tel further recommend measures for the percent of missing confirmations and rejections as well as billing and provisioning completion notices. The BANY PAP[16] contains a measure titled: "Missing Notifier Trouble Tickets Cleared in Three Days." WorldCom and Z-Tel recommend that the same measure be adopted here, with a small change. The change desired would require that the measure be calculated until the trouble ticket is closed, not just cleared. A related measure on resubmission of orders should be adopted as well.

78. WorldCom and Z-Tel state that the BANY PAP is more inclusive of change management measures. The BANY PAP includes measures for the following issues: notification of system changes, software validation, change management timeliness, and the resolution of problems within Verizon's (formerly known as Bell Atlantic's) systems. These measures are subdivided into five categories: emergency, regulatory, industry standards, requests by Verizon, and CLEC requests. These measures and subdivisions include time lines and intervals. WorldCom and Z-Tel mention that this approach is more flexible and responsive.

79. Several features of any change management process are listed: 1) freeze time to enable CLECs to implement and test a proposed change, 2) time frame and explanation of effects of new changes, 3) backwards compatibility after installation for a specific time period, 4) CLEC feedback opportunity, 5) standards for stable test environment provided to CLECs, and 6) plan for reversing a change in the presence of significant problems.

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[15] A "test deck" refers to a simulated OSS system that allows CLECs to "practice" interacting with Qwest's OSS and to determine whether their systems are functioning properly. The test deck is also referred to as the "test bed" and the "Stand Alone Testing Environment" or SATE.

[16] This refers to the Bell Atlantic New York (BANY) Performance Assurance Plan approved by the FCC.

80. WorldCom and Z-Tel state that the Qwest CICMP[17] process only provides CLECs the opportunity to suggest changes. Qwest is in charge of decision making and implementing the proposed changes. WorldCom and Z-Tel argue for greater visibility into Qwest's decision making process and an ability to resolve disputes if CLECs disagree with Qwest decisions regarding change management. WorldCom and Z-Tel would like to have access to a database in which all aspects of Qwest's change management processes are addressed.

81. WorldCom and Z-Tel discuss the recommendations made in the Colorado Draft Report[18] on change management. The Colorado Draft Report recommends that a group be created to maintain a website on change management issues, hold collaborative forums on change management, serve as a complaint contact, and participate in revising the PAP.

82. Qwest states in its reply brief that its two proposed change management measures were adopted in the Texas PAP. Qwest states that these are appropriate since it has similar processes as SBC. Qwest stands by its opening brief statements regarding PO-16 and GA-7. Qwest states that its CICMP process is compatible with the recommendations made by the Special Master in Colorado[19].

83. WorldCom states in its reply brief that the GA-7 change management measure proposed by Qwest should not be diagnostic. This should be a benchmark measure which requires 100% compliance by Qwest. WorldCom states that Qwest's proposed change management measurements (PO-16 and GA-7) are not enough. Two additional change management measures should be developed: "Software Validation" and RQ-3 ("Release Quality"). The Release Quality measure would address the number of software releases that require changes or retraction within 14 days of their implementation.

84. Change management is not included in the ROC agreed upon amendments subsequently submitted by Qwest.

b. <u>Discussion and Staff Recommendation</u>

85. Change management PIDs are an important part of maintaining the integrity of the PAP. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff proposed that PO-16 and GA-7 be included in the PAP prior to the six-month review and prior to Qwest filing its 271 application with the FCC. Staff stated that both of these measures should be included as more than diagnostic measures (i.e., they should have benchmark standards and penalties imposed for non-conformance). The other two PIDs

[17] CICMP stands for Co-Provider Industry Change Management Process. This is an organization through which Qwest communicates with CLECs and solicits comments from the CLECs. The CICMP has been renamed the Change Management Process (CMP).

[18] Weiser, Phil. *Draft Report and Recommendation and Further Request For Comments*, 2001. This is a draft PAP developed by Phil Weiser (known as the "Special Master") for Qwest's Colorado 271 proceeding.

[19] Weiser, Phil. *Draft Report and Recommendation and Further Request For Comments*, 2001.

suggested, "Software Validation" and RQ-3, should not be included in the PAP as a diagnostic measure at this time. At the six-month review, the Commission and interested parties can review the results of Qwest's performance in this area and determine at that time whether the development of both of these measures is necessary for inclusion in the PAP.

86. Qwest did submit comments on this issue in response to Staff's initial report. Qwest states that it will include PO-16 and GA-7 in the PAP once standards are adopted by the parties. Qwest states that these measurements will be classified as Tier II with a high ranking given to payments.

86. WorldCom also submitted comments on this issue in response to Staff's initial report. WorldCom agreed with Staff's recommendation that PO-16 and GA-7 be included in the PAP. WorldCom states that parties have now agreed to standards for both of these measures. The GA-7 standard is one miss for volumes between 1 and 20. For volumes greater than 20, a 95% benchmark will be used. WorldCom states that parties are in the process of creating a standard for PO-16. WorldCom states that the PO-16 standard should be included in the PAP once the standard is developed.

87. WorldCom states that Staff has not recommended payment levels for these change management measures. WorldCom recommends that Staff not agree to Qwest's proposal to classify these measures as Tier II with a high payment ranking. Instead, WorldCom proposes that Staff review and adopt the Colorado recommendations on these change management issues.

88. WorldCom also mentions that Qwest has developed a change management measure related to Qwest's SATE: PO-19 ("Stand-Alone Test Environment"). Parties have not developed a standard, but WorldCom recommends that this measure be included in the PAP.

89. Staff continues to recommend that PO-16 and GA-7 be included in the PAP prior to the six-month review. Staff agrees with the parties' proposed standards for GA-7. Since comments were filed on Staff's report, parties have agreed to a standard for PO-16. For volumes between one and ten, Qwest will be allowed one miss. For volumes greater than ten, the benchmark standard is 92.5%. Staff agrees with this standard for PO-16. Staff agrees with Qwest that these measures will be classified as Tier II with a high payment ranking. This payment classification can be modified as necessary in the six-month PAP review.

90. Staff agrees with WorldCom that the PO-19 SATE measurement be included in the PAP. Staff recommends that if parties develop a standard for this measurement prior to the effective date of the PAP, then parties' recommended standard should be adopted. If no standard is developed prior to the effective date of the PAP, then Staff recommends that PO-19 be diagnostic. This diagnostic standard can be reviewed at the six-month PAP review.

DISPUTED ISSUE NO. 3: Root Cause Analysis (PAP – 3)

91. One of the goals of the PAP is to ensure that when Qwest is non-compliant in an area, that the cause of this noncompliance is addressed. In this way, future improvement can be assured. Root cause analysis performed by Qwest would examine the root causes for Qwest's failures. Once this understanding is obtained, Qwest could make true improvements rather than merely treating symptoms of its poor performance.

1. Summary of Qwest and CLEC Positions

92. Qwest states in its opening brief that it will investigate consecutive two-month failures for measures at the Tier II level. Qwest will identify a solution based on its investigations as to the causes of a miss. Qwest states that due to low CLEC volumes in Arizona, root cause analysis at the Tier I level is unwarranted. Qwest also states that for this same reason, requiring root cause analysis for all measures missed for two consecutive months at a mean difference of at least 25% is unreasonable.

93. WorldCom and Z-Tel jointly filed an opening brief on this issue. The parties state that the Texas PAP was modified after the first six-month PAP review to include root cause analysis on an *aggregate basis for Tier I* after two consecutive months of failure on a performance measure. WorldCom and Z-Tel want Qwest to adopt this change in the Arizona PAP. WorldCom and Z-Tel state that when a measure is missed for three consecutive months, then a root cause analysis is warranted. Also, if a measure is missed for two consecutive months at a mean difference of at least 25%, then root cause analysis should also be performed. The Arizona Corporation Commission should have the ability to perform a root cause analysis at any time it deems necessary.

94. Qwest's reply brief states that it has provided its root cause analysis proposal in its opening brief.

95. WorldCom restates in its reply brief its position as outlined in its opening brief. It clarifies that the Commission should formally establish its right to initiate root cause analysis. WorldCom states that any root cause analysis findings should be posted to Qwest's website with the corresponding remedial action. A PAP audit process which includes root cause analysis could alleviate the need for extensive root cause analysis outside of an audit. This audit process should investigate the issue and ameliorate the problem.

96. In its proposed modifications reflecting agreements reached in the ROC, Qwest restates that it will investigate consecutive two-month failures for measures at the Tier II level.

97. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. **Discussion and Staff Recommendation**

98. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff stated that root cause analysis is necessary. Qwest should perform root cause analysis on a CLEC aggregate basis for Tier I after two consecutive months of failure on a performance measure. Staff agreed with Qwest that it investigate consecutive two-month failures for measures at the Tier II level. If an individual CLEC requests root cause analysis, then it should be performed by Qwest. The dispute resolution process may be used if Qwest refuses a CLEC request for root cause analysis. Staff also stated that the Commission may request root cause analysis at any time that it deems necessary.

99. Qwest stated in its opening brief that due to low CLEC volumes in Arizona, root cause analysis at the Tier I level is unwarranted. However, CLECs are most vulnerable when entering a new market. This time is marked by low CLEC volumes. It is at this stage that root cause analysis can be most beneficial to CLECs.

100. Qwest's root cause analysis should identify the cause of the failure and its proposed solution. These results should be provided to the Commission and all CLECs.

101. Qwest did submit comments on this issue in response to Staff's initial report. Qwest agrees to supply root cause conclusions to all CLECs as long as confidential and proprietary information about Qwest or CLECs is not disclosed.

102. WorldCom also submitted comments on this issue in response to Staff's initial report. WorldCom agreed with Staff's initial recommendation. WorldCom also wanted Staff to specify how Qwest should provide root cause information to parties. WorldCom recommends that Qwest file root cause information in this proceeding, serves all parties with this information, and posts this information at a specified location.

103. RUCO submitted comments on this issue also in response to Staff's initial report. RUCO agrees with Staff's initial recommendation. However, RUCO clarifies that root cause analysis should be performed at the Tier I and Tier II levels.

104. Staff agrees with Qwest that it should not be required to disclose confidential or proprietary information in its submission of root cause analysis conclusions. Therefore, reports on root cause analysis should be issued in a redacted format when appropriate. In response to WorldCom's concerns, Staff does not believe that it needs to identify the methods by which Qwest will notify parties of root cause analysis conclusions. Staff leaves the dissemination of this information to Qwest's discretion. However, Staff emphasizes that the results of root cause analysis should be easily accessible to the CLECs. Qwest should include its proposed method for disseminating the results in its revised Arizona QPAP. In response to RUCO's concerns, Staff does believe that its root cause analysis proposal is sufficient to satisfy RUCO's concerns regarding Tier I and Tier II root cause analysis.

DISPUTED ISSUE NO. 4: K-Table (PAP – 4)

105. The K-Table corrects for the statistical error that allegedly exists in the PAP. When the PAP's individual CLEC monthly results are calculated, the K-Table is applied to them. The K-Table allows forgiveness for some of the penalties for which Qwest would have been liable.

a. Summary of Qwest and CLEC Positions

106. Qwest states in its April 5, 2001, comments that it does not support the balanced exclusion table as presented by Z-Tel.[20] Qwest also commented on the K-Table in its opening brief. A z-test is used to determine if differences in samples are statistically significant. The standard applied in Qwest's PAP (and more generally) is to provide 95% confidence that the observed results from the samples truly differ. In other words, it is a test at the 5% level of significance, which means that the z statistic is equal to 1.645.

107. This results in approximately 5% of a large number of observations appearing to be significantly different from a statistical perspective even though, in reality, they are not different at all. This is Type I error (falsely concluding that Qwest is not providing parity service). The greater the number of parity tests performed the greater becomes the probability of a Type I error. Qwest opposes making adjustments for Type II error (falsely concluding parity) because, outside of a controlled test environment, Type II error cannot properly be controlled without affecting Type I error. Type II error is unknown because determining it requires assumptions about the "true" difference in the population. If the true difference were known, there would be no need for statistical testing – the purpose of statistical testing is to estimate the difference that truly exists. It is possible to hold the probability of Type I error to 5% when conducting only one z-test. However, when multiple Z tests are conducted, Type I error increases. For example, if 10 tests each have a 5% chance of Type I error, then there is a combined probability of 40% that at least one test will be failed purely by random chance alone.

108. The K-Table was developed by Dr. Collin Mallows of AT&T[21] and by MCI/WorldCom[22]. The K-Table keeps the combined Type I error rate at 5% regardless of how many tests are run. Therefore, the K-Table reduces, but does not eliminate, the occurrences of false failures for which Qwest will be required to make payments to CLECs. The effect of the K-Table on payments will vary from CLEC to CLEC[23]. Qwest

[20] The balanced exclusion table was proposed by Z-Tel during the workshop process as an alternative to the K-table.

[21] Qwest Exhibit 17 (Testimony of Dr. Collin Mallows, AT&T, "In the Matter of Performance Measurements and Reporting Requirements for Operations Support Services, Interconnection, and Operator Services and Directory Assistance," FCC Docket No. 98-56, May 29, 1998).

[22] Qwest Exhibit 18 (MCI and WorldCom, "Local Service Non-Discrimination Compliance and Compliance Enforcement," Version 1.0, August 4, 1998).

[23] Note, Qwest's proposed K-Table applies to Tier I payments only. Tier II payments are not subject to any K-Table exclusions.

proposes to apply K-table exclusions in a systematic manner such that missed PIDs that are designated as "low" will be excluded first. This method would decrease the mitigating effect of the K-Table on payments. Qwest's K-Table is essentially the same as the one adopted in Texas, Kansas, and Oklahoma.

109. WorldCom filed comments on this issue on April 5, 2001. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that the K-Table is conceptually flawed and allows for excessive forgiveness. WorldCom supports rejecting the K-Table in its entirety. However, if the Commission does not agree with rejecting the K-Table outright, WorldCom recommends the balanced exclusion table (submitted by Z-Tel in the February workshop), which accounts for both Type I and Type II error. If the Commission does decide to go with Qwest's K-Table WorldCom recommends that limits on sample sizes, z-score levels, or means differences should be considered. Also, repeated misses over more than one month should never be forgiven.

110. In the opening brief, WorldCom and Z-Tel state: "Statistical issues aside, a large means difference between Qwest and the CLECs will generate harm to the CLEC and gain to Qwest, regardless of whether or not the means difference was the result of Type I error or not." The Pennsylvania PUC has adopted a PAP with no K-Table forgiveness and the New Jersey PUC's staff has recommended a PAP with no K-Table. The New York Verizon plan had no K-Table and only limited forgiveness.

111. Qwest submitted comments on this issue in its reply brief. In the ROC Qwest has agreed to eliminate the K-Table in exchange for graduated z score critical values. Qwest is making the same offer here in Arizona. The ROC agreement eliminates the K-Table and specifies the following critical values to be used for statistical testing in the PAP:

Table 1: ROC Critical Value/Confidence Level Proposal

Sample Size	LIS Trunks, UDITs, Resale, Unbundled Loops – DS1 and DS3	All Other Parity Measurements
1-10	1.04 / 0.8508	1.645 / 0.95
11-150	1.645 / 0.95	1.645 / 0.95
151-300	2.0 / 0.97	2.0 / 0.97
301-600	2.7 / 0.9965	2.7 / 0.9965
601-3000	3.7 / 0.9999	3.7 / 0.9999
3001 and above	4.3 / 1	4.3 / 1

112. While the K-Table applied only to Tier I payments, Qwest proposes using the above graduated critical values for both Tier I and Tier II payments.

113. WorldCom submitted comments on this issue in its reply brief. Qwest has agreed to eliminate the K-Table in the ROC in exchange for graduated critical values. WorldCom will accept this compromise as long as all measures with sample sizes less than 10 have a critical value of 1.04.

114. In response, Qwest restated the agreement reached in the ROC on the K-Table. In the ROC proceeding, Qwest agreed to eliminate the K-Table in the PAP. In its place, Qwest and certain CLECs (that did not participate in the Arizona PAP process) agreed to the ROC critical value proposal in Table 1. It was also agreed that the 1.04 critical value would not be used in determining what constitutes a miss for consecutive months. The critical value of 1.645 (which provides a 95% level of confidence that the observed results from the samples truly differ) would be used instead. In instances where the performance measurements are disaggregated into two zones (i.e., regions), these zones would be combined in order to perform statistical tests.

115. WorldCom submitted additional comments in response to Qwest's filing on its ROC proposal. WorldCom does not support the proposal outlined by Qwest in its ROC filing. WorldCom would prefer critical values of 1.645 (which gives a 95% confidence level) for all sample sizes. WorldCom also states that it would be in favor of Qwest's ROC proposal if the critical value of 1.04 was extended to all services with sample sizes between one and ten. There is a high probability of committing a Type II error when sample sizes are small. WorldCom restates that Type I and Type II error should be balanced.

b. Discussion and Staff Recommendation

116. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff did not agree with the inclusion of the K-Table. Therefore, Staff was more agreeable to the ROC proposal submitted by Qwest than the K-Table. However, Staff still disagreed with the critical values/confidence levels in the ROC proposal.

117. Information provided confidentially by Qwest indicated that Tier II payments are severely restricted under Qwest's ROC proposal even though Tier II payments were never subjected to K-Table forgiveness in the first place. (The initial K-Table proposed by Qwest did not apply to Tier II payments.) Under the new ROC proposal, Qwest's Table 1 would apply to both Tier I and Tier II payments. Staff proposed that the ROC proposal, as modified in Table 2, be used for Tier I payments. For Tier II payments, Staff proposed that Table 2 not apply (i.e., that a critical value of 1.645 be used in all instances).

Table 2: Staff Modified Critical Value/Confidence Level Proposal

Sample Size	LIS Trunks, UDITs, Resale, Unbundled Loops – DS1 and DS3	All Other Parity Measurements
1-10	1.04 / 0.8508	1.645 / 0.95
11-150	1.645 / 0.95	1.645 / 0.95
151-300	2.0 / 0.97	2.0 / 0.97
301-600	2.0 / 0.97	2.0 / 0.97
601-3000	2.0 / 0.97	2.0 / 0.97
3001 and above	2.0 / 0.97	2.0 / 0.97

118. Staff stated that critical values greater than 2.0 are inappropriate. Qwest had offered no explanation as to why such high critical values are appropriate from a statistical perspective. Staff stated that the critical values given in Table 1 essentially discriminate against CLECs which focus on selling high volumes of a particular service. Such CLECs would not receive the same protection as those that specialize in selling low volumes of many different services. Such discrimination is likely to be in Qwest's best interests, but not in the best interest of competitors nor consumers.

119. Qwest did submit comments on this issue in response to Staff's initial report. Qwest states that it offered its critical value proposal in order to replace the K-Table. Qwest only agreed to the K-Table elimination inasmuch as the critical value proposal was adopted by Staff in its entirety. Qwest states that Staff's proposed critical value table does not afford Qwest the same protection from penalties as did Qwest's own critical value proposal. Qwest recommends that Staff's proposed critical value table be rejected.

120. WorldCom also submitted comments on this issue in response to Staff's initial report. WorldCom agreed with Staff to the limit of a 2.0 z-score level for sample sizes of 151 and above. WorldCom states that Staff has not addressed its concern regarding the services covered with sample sizes between one and ten. The critical value table proposed by Staff only covers LIS Trunks, UDITs, Resale, and Unbundled Loops (DS1 and DS3). WorldCom asks that all services be covered by the 1.04 z-score in the sample sizes are between one and ten.

121. Neither Qwest nor WorldCom address the merits of Staff's proposed resolution in their comments in response to Staff's initial report. Therefore, Staff continues to recommend that its critical value proposal (Table 2) be adopted. Staff appreciates the effort of Qwest and other parties to come to an agreement on this difficult issue. However, Staff does not believe that the agreement among the parties would be in the public interest. Staff does not believe that the Arizona Commission is obligated in any way to adopt agreements from other jurisdictions without significant and critical review. For this reason, Staff could not agree to adopt the ROC critical value proposal. Staff does not agree with WorldCom's proposal that all services with volumes of less than ten be measured at a z-score of 1.04. Staff believes this change would unduly penalize Qwest. However, Staff reserves the right to review this issue at the six-month PAP review.

DISPUTED ISSUE NO. 5: Penalty Cap (PAP-5)

122. A cap on the total amount of payments to be made under the PAP has been used in numerous states. This cap has been an absolute cap on the total percentage of revenues of the local provider which can be paid under the PAP in one year. Below are the comments of the parties on a provision in the PAP which would impose a cap on total payments.

a. Summary of Qwest and CLEC Positions

123. Qwest states in its opening brief that its proposal of a cap of 36% of net local revenue provides sufficient incentive for Qwest to improve its wholesale service. Qwest states that 44% of net local revenue is overly onerous and not justified in Arizona. Qwest also states that its 271 approval would be in jeopardy if it were paying substantial remedies to CLECs and to the State of Arizona. This fact would provide additional incentive for Qwest to implement service improvements.

124. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel believe that a procedural cap should be established, rather than an absolute cap. When the procedural cap is reached, a review of Qwest's performance would be conducted. The procedural cap should be set at 44% of Qwest's net local revenues. WorldCom and Z-Tel believe that by setting an absolute cap, the effectiveness of the PAP would be undermined. The per-occurrence and per measure caps in Qwest's PAP would also reduce the PAP's effectiveness. WorldCom and Z-Tel end by stating that no caps on the remedy payments to one CLEC should be established

125. Qwest states in its reply brief that the PAPs approved in Texas, Kansas, Oklahoma, and New York all have absolute penalty caps. Qwest states that 36% of net local revenue is significant and would induce Qwest to improve wholesale service quality. Qwest states that it agreed in the ROC to remove the per measure caps on PO-7 and NI-1. Qwest would agree to do the same in the Arizona proceeding.

126. WorldCom states in its reply brief that it continues to oppose an absolute penalty cap as stated in its opening brief.

127. Qwest agreed in the ROC to remove the per measurement penalty caps on the following PIDs: PO-1, PO-3, PO-7, and NI-1. Qwest would retain the per measurement penalty caps on BI-1, BI-3, and BI-4. Qwest offers this same proposal in the Arizona proceeding as a possible resolution to the penalty cap issue.

128. WorldCom responded to Qwest's ROC proposal. WorldCom agrees with Qwest's changes as cited in Qwest's ROC proposal. WorldCom agrees that these changes resolve this issue.

b. Discussion and Staff Recommendation

129. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff stated that it is appropriate to place a cap of 36% of total Arizona net revenues per year. If this cap is deemed inadequate, then it can be changed at the PAP six-month review period. Staff clarified that Qwest's suggestion that depreciation rates in Arizona be used in calculating revenues is not appropriate. The cap should be 36% of net revenues as calculated in Qwest's ARMIS reports.

130. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom opposes any penalty caps.

131. RUCO did submit comments on this issue in response to Staff's initial report. RUCO references the Colorado PAP's ("CPAP") language on this issue. The CPAP sets an annual cap of $100 million. The CPAP also specifies certain exceptions to the cap (e.g., interest payments and late filing or reporting penalties). The CPAP penalty cap may be raised based on Qwest's performance.

132. Staff maintains its position of setting an annual cap of 36% of total Arizona net revenues per year. Staff believes that an annual cap is important in that it can alert parties of extraordinary payment amounts which may merit review of Qwest's §271 approval. However, setting the annual cap above 36% would be excessive at this time. The six-month PAP review would enable an adjustment of the annual cap if it was deemed necessary to ensure compliance.

DISPUTED ISSUED NO. 6: Minimum Per Occurrence Penalty (PAP – 6b)

133. In the PAP Workshops, discussion arose over having a minimum penalty amount applied to each occurrence of a failure. This minimum amount would be received by the CLECs as a Tier I payment. Qwest opposes minimum per occurrence penalties. The CLECs are in favor of minimum per occurrence penalties.

a. Summary of Qwest and CLEC Positions

134. Qwest supplied comments on this issue in its April 5, 2001, filing. Qwest states that the CLECs have not provided any factual support for their arguments supporting minimum payments. Originally Z-Tel had proposed a minimum penalty of $15,000, then $5,000, and now $2,500. Qwest stated that this draws into question what their previous minimum payment amounts represented.

135. Qwest filed an opening brief addressing this issue. Qwest states that the CLECs minimum payment proposal is unreasonable and unfair because it results in payments in excess of the actual harm to the CLECs. Arizona data demonstrate that, on average, 61 percent of the results on the sub-measurement level have fewer than ten data points. Given this level of dissagregation a large CLEC could have hundreds of orders in a given month, but those orders could be spread across a number of services and geographic zones, thereby giving the false appearance that the CLEC is small. This could lead to multiple minimum payments which is fundamentally unfair. Since Z-Tel changed their minimum penalty proposal from $15,000 to $5,000 and then to $2,500; Qwest states that their proposal must be arbitrary. Qwest contends that any minimum penalty will be arbitrary since actual CLEC harm is fact specific.

136. Qwest proposed a provision that applies minimum penalties to nascent services in its November filing, (see Section 10 of Qwest's PAP Low Volume, Developing Markets). Section 10 provides that when the aggregate monthly volume for a

qualifying performance measurement for CLECs participating in the PAP is between 10 and 100 and Qwest misses the standard for the qualifying sub-measurement, Qwest will make a Tier I payment to participating CLECs. The Qwest payment will be calculated on a CLEC aggregate volume for the measurement and apportioned to the affected CLECs based upon their relative share of the service misses. The payment calculation will be subject to a $5,000 minimum. There will be no K-table exclusions for these measures but they will count in calculating the K values. This is similar to a provision in the Texas plan, however in Texas payments in the nascent services part of the plan go to the state (i.e., they are Tier II payments) not the CLECs.

137. WorldCom filed comments on April 5, 2001, addressing this issue. They state that small order counts will never produce much in the way of penalty payments. However, discrimination against CLECs with small order counts may be a potent impediment to competition. WorldCom proposes a minimum penalty level of $2,500. Also, duration and severity factors should be applied.

138. WorldCom and Z-Tel jointly filed an opening brief on this issue. The above statement is reiterated. For example, a CLEC having problems with its first 100 loops would likely not roll out a plan to purchase 10,000 loops. The per occurrence payments Qwest would have to make would be very small relative to what they plan to gain by slowing the CLECs ramp up plans. Qwest may pay penalties on each of the 100 loop orders and still make a profit due to the monthly collocation charge which CLECs must pay whether loops are connected or not.

139. Qwest filed a reply brief on this issue stating that the CLECs' example of problems with ordering an initial 100 loops leading to cancellation of plans to market 10,000 loops is purely hypothetical speculation. The specter of hypothetical, unspecified harm to CLEC marketing plans is not a sound basis for implementing minimum per occurrence penalty payments.

140. WorldCom's reply brief reiterated its position from its opening brief.

141. This issue was not included in Qwest's submission containing agreements reached in the ROC proceeding which Qwest proposed to import into Arizona. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. Discussion and Staff Recommendation

142. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that no minimum penalty should apply besides that for nascent services outlined in Qwest's opening brief. Staff was concerned that the level of disaggregation in the PAP could result in multiple minimum payments for a single occurrence. Also, Staff believed that the penalties in the PAP, absent minimum payments, are sufficient to incent Qwest to provide parity OSS service to the CLECs.

143. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom asks that Staff reconsider its recommendation. WorldCom mentions the minimum payments in the Liberty Consulting report dated October 22, 2001. This report by Liberty recommended a minimum payment of $2,000 per month "for each month in which Qwest missed any measure applicable to such CLECs."[24] WorldCom also mentions the CPAP recommendation. This recommendation called for a minimum per measure payment of $600 for larger CLECs or $300 for CLECs with less than 100,000 lines in service in Colorado.

144. Staff maintains its prior recommendation. Staff agrees that a minimum penalty should only apply to the nascent services mentioned in Qwest's opening brief. Staff would like to review this issue at the six-month PAP review. Knowing Qwest's actual performance under the PAP, and the state of competition in Arizona following §271 approval, would enable Staff to determine whether additional minimum payments are necessary.

DISPUTED ISSUE NO. 7: Duration Factors (PAP – 6c)

145. Qwest has proposed that penalties should escalate month after month if Qwest misses a performance measure several months in a row (such escalation is referred to as a "duration factor."). Qwest proposes that penalties begin escalating with the second month a measure is missed and continue to escalate until the sixth month it is missed (see Table 3 below). After the sixth month the penalty level will remain constant until the measure is not missed. The CLECs favor continued escalation beyond six months.

Table 3: Qwest Tier I Penalty Payment Levels

Per Occurrence						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$150	$250	$500	$600	$700	$800
Medium	$75	$150	$300	$400	$500	$600
Low	$25	$50	$100	$200	$300	$400

Per Measure/Cap						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000
Low	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000

a. Summary of Qwest and CLEC Positions

146. Qwest provided comments on this issue in its April 5, 2001, filing. Qwest believes that the issue of the escalation of Tier I and Tier II payments, whether through the extension of the QPAP payment table beyond six months, a factor for severity, the calculation of occurrences, or sticky duration, must be addressed jointly because the true

[24] Liberty Consulting Group Report on QPAP, October 22, 2001, pg. 67.

issue is the overall level of PAP payments. Qwest claims that exhibits they have presented demonstrate that the QPAP provides more than adequate financial incentive to provide compliant service while the CLEC proposals are overly punitive.

147. Qwest provided comments on this issue in its opening brief. The per occurrence payment amounts should not escalate any further because the six-month levels already greatly exceed any potential financial harm to the CLECs. At the December workshop, Qwest demonstrated through Exhibit 5 that CLECs have the opportunity to receive PAP payments that substantially exceed the potential lost profit from losing the customer. With the likely inclusion of additional Tier II per occurrence payments of $200, $300, and $500, Qwest will already have substantial incentive to fix non-compliant service. The CLECs have submitted no evidence of the financial harm they might incur from missed performance standards.

148. WorldCom discussed this issue in its April 5, 2001, filing. WorldCom indicated that it is unclear why Qwest would be okay with escalating payments but would limit escalations to the 6^{th} month. Stopping the escalation of payments after 6 months makes it easier for Qwest to judge whether the costs and benefits of not fixing the problems outweigh the remedies at risk.

149. WorldCom and Z-Tel jointly filed comments on this issue in their opening brief. They state that Qwest's proposed duration factor is insufficient. The percentage increase in remedy amounts from month to month drops dramatically after the fourth month and beyond, with a 0% increase after the 6^{th} month. Continuous duration penalty escalation discourages repeated non-conformance. Repeated non-conformance indicates that payment levels are too low and are being treated as a cost of doing business. If penalties escalate continuously eventually Qwest will have an incentive to fix the problem. The Pennsylvania PAP adopted on December 31, 1999, requires a pro rata remedy the first month and then remedies of $2000 for the second month and $4000 for the third month on top of the pro rata amounts. At the fourth month of non-compliance, the PUC can levy up to an additional $25,000 fine, but it is not self-executing like the second and third month fines. Also, Bell Atlantic-Pennsylvania must have two compliant months in a row before penalties return to the first month pro rata level.

150. Qwest filed comments on this issue in its reply brief. The CLECs' reliance on a quote from a portion of the Pennsylvania remedy plan to support their arguments on continuous escalation is misplaced. The Qwest plan is adequate, and it is neither helpful nor appropriate for CLECs to pick and choose advantageous provisions from plans from other jurisdictions.

151. WorldCom filed comments on this issue in its reply brief that state that Qwest's claim that continuously escalating penalties will result in a windfall for the CLECs is not true. Qwest's measure of CLEC harm is inadequate.

152. Qwest does not mention this issue in its filing on the ROC proceeding. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. Discussion and Staff Recommendation

154. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that an additional duration factor past the sixth month is not necessary. If it is determined that the penalty levels are not high enough, then the issue of duration factors can be revisited at the six-month PAP review.

155. Staff noted that Qwest's contentions about the "lost profit" CLECs would receive from Qwest's performance misses are contradicted by statements Qwest has made concerning the impasse issue on the limitations of the plan (see Disputed Issue No. 14 of this report). With respect to plan limitations, Qwest stated in Disputed Issue No. 14 that the damage to the CLECs from performance misses is unknown and unknowable. Staff also notes that since the purpose of the PAP is to provide incentives to Qwest, not to compensate CLECs, arguments concerning harm to the CLECs are not relevant.

156. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom opposes the payment escalation limit at six months. WorldCom states that Commissions in Utah and Colorado both disagreed with a imposing a limit on escalation. WorldCom asks that Staff reconsider its recommendation.

154. RUCO did submit comments on this issue in response to Staff's initial report. RUCO suggests that Staff consider the CPAP approach to this issue. The CPAP states that the total per occurrence payment will be multiplied by two starting in the second continuous month missing a performance measurement. The multiplier will be three in the third continuous month of poor performance. The escalation will continue in this fashion until Qwest meets performance standards.

155. Staff continues to support its prior recommendation. However, Staff would like to clarify its recommendation. Staff advocates payment escalation for both Tier I and Tier II payments. The penalty payments outlined in Table 3 are agreeable to Staff for Tier I escalation. Table 4 outlines the initial Tier II penalty payment levels recommended by Qwest. Staff agrees that these payment levels are appropriate for the first month in which Qwest makes Tier II penalty payments. For most measurements, this first Tier II payment will be made after three consecutive months of performance misses. For the measurements mentioned in Table 6 under the section covering "Disputed Issue No. 9", the escalation levels will vary and are listed in Table 7 of that same section. Staff's Tier II escalation payments for other Tier II measures are set forth in Table 5. These Table 5 figures are derived by utilizing Qwest's Tier II payment in the first month of payment penalties (which is actually the third month of consecutive misses). These payment levels closely match the Tier I payments in the third consecutive

month of non-compliance.[25] Staff then extrapolated to the following months using the same escalation increments used by Qwest in its Tier I payments outlined in Table 3.[26]

Table 4: Qwest Tier II Penalty Payment Levels

Per Occurrence	
Measurement Group	
High	$500
Medium	$300
Low	$200

Per Measure/Cap	
Measurement Group	
High	$75,000
Medium	$30,000
Low	$20,000

Table 5: Staff's Proposed Tier II Penalty Payment Levels[27]

Per Occurrence			
Measurement Group	Month 3	Month 4	Month 6 & each following
High	$500	$600	$700
Medium	$300	$400	$500
Low	$200	$300	$400

Per Measure/Cap			
Measurement Group	Month 3	Month 4	Month 6 & each following
High	$75,000	$100,000	$125,000
Medium	$30,000	$40,000	$50,000
Low	$20,000	$25,000	$30,000

DISPUTED ISSUE NO. 8: Bill Credits Versus Cash Payments (PAP – 6d)

156. Qwest has proposed to pay out PAP penalties to the CLECs in the form of bill credits applied to the amount of the CLECs monthly bill to Qwest. CLECs oppose this method of payment and want monthly cash payments.

[25] The only difference noted by Staff is that the Tier I per occurrence payment level for low ranking measurements is $100 less than the Tier II per occurrence payment level. Also, the Tier I per measure/cap payment level for low ranking measurements is $5000 less than the Tier II per measure/cap payment level.
[26] For low ranking measurements, Staff added $100 to the Tier I per occurrence payment levels for each month of Tier II per occurrence payment escalation. Also, for low ranking measurements, Staff added $5,000 to the Tier I per measure/cap payment levels for each month of Tier II per measure/cap payment escalation.
[27] This table does not apply to the measurements mentioned in Table 6 of this Staff Report. Table 7 in "Disputed Issue No. 9" will include the escalation payment levels for the measurements specified in Table 6.

a. **Summary of Qwest and CLEC Positions**

157. Qwest filed comments on this issue in its opening brief. In that brief Qwest states that the PAPs in Kansas, Massachusetts, New York, and Texas all use bill credits. CLEC claims that checks are easier to administer than bill credits are unsubstantiated. Financial management at a modern corporation is done through an accounting system not a cash box. Qwest senior management does not hand sign all checks. Whether paid by bill credit or check the payments will be visible to senior management.

158. WorldCom filed comments on this issue in its filing dated April 5, 2001. There it states that payments to CLECs should be made by check by the end of the month following the data report (e.g. June data, reported in July, remedies paid by August 31). Qwest should be liable for accrued interest for every day the payment is late. An invoice should accompany the payment explaining the calculation for each submetric missed. Payment by check is necessary to ensure payment and is easier for CLECs to track. Bill credits are inappropriate because they are not easily traceable back to a specific CLEC account for credit, are less visible and hence less motivating to Qwest management, and are hard to track when Qwest billing is erratic or subject to numerous billing disputes. Penalty payments can potentially be greater than the bill for a given month, which will result in direct payments anyway. If direct payments are going to be used when this happens and for Tier II payments, why design two entire payment systems?

159. WorldCom and Z-Tel jointly filed an opening brief on this issue that restates the position of the April 5 filing. Also, they indicate that the Pennsylvania and Michigan orders require direct payment to the CLECs and Pennsylvania requires an invoice attached to the payment. Bell South's plan in Georgia has always included only direct payments.

160. Qwest filed a reply brief on this issue. Qwest believes the most important elements of payment delivery are timeliness and accuracy and that it should have the flexibility of using its billing process to administer payments. Direct payments are not more accurate or easier to audit; they are more costly to administer. Qwest agreed in the ROC to supply detailed statements showing exact PAP payment calculations. Qwest agreed to provide CLECs with sample statements and to accept input from the CLECs regarding the design of these statements. Qwest extends the same offer in AZ.

161. WorldCom filed a reply brief on this issue. The position stated on April 5, 2001, is reiterated. However, whatever payment method is ordered, the Commission must order Qwest to provide an adequate explanation of the payments being made. The Commission should require Qwest to provide it with a prototype of any explanation of payments to ensure that the explanation is complete, detailed, and allows CLECs to track the reasons for Qwest penalty payments.

162. Qwest does not mention this issue in its filing on the ROC proceeding. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. Discussion and Staff Recommendation

168. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that bill credits are an adequate means of administering the PAP. If, in a given month, Qwest owes a CLEC more in penalties than the CLEC's monthly bill to Qwest, the balance should be paid by check from Qwest. Bill amounts that are in dispute should be netted out of the above calculation. Each month, each CLEC should receive a statement from Qwest detailing the source of the PAP payments the CLEC received.

169. It is important that penalty payments are received with timeliness. Staff agreed with the CLEC's proposal that Qwest remit payments by the end of the month following the data report (through bill credit or check as stated above). Staff does believe that a five-day grace period for Qwest to remit payment is appropriate. If Qwest does not comply, then Qwest will be liable for accrued interest for each day the payment is late. The Colorado Final PAP Report[28] included a recommendation that Qwest pay interest at twice the one-year treasury rate if it provides late payments (due to a need to correct a report). Staff supported this level of interest if Qwest is late in making a payment to a CLEC, whether due to correction of a report or otherwise.

170. WorldCom did comment on this issue in their response to Staff's initial report. WorldCom believes that Staff should reconsider its initial recommendation and indicates that the Colorado Hearing Commissioner sided with WorldCom on this issue.

171. Staff continues to support its prior recommendation of bill credits in spite of WorldCom's comments.

DISPUTED ISSUE NO. 9: Penalty Classification (PAP – 9)

172. Each of the measures proposed in the PAP are classified and ranked according to their importance. The classification categories are Tier I and Tier II. Penalty payments in Tier I would be received by the effected CLECs. Penalty payments in Tier II would not be received by CLECs but will be paid into a fund administered by the state. Each measure is also ranked as "high", "medium", or "low" and penalty amounts vary accordingly.

a. Summary of Qwest and CLEC Positions

173. Qwest mentions the classification of measures in its opening brief. Qwest states that all measures are classified as Tier I unless measures are diagnostic, measures are parity by design, or individual CLEC results are not reported for those measures. Qwest also mentions five measures (GA-3, GA-4, MR-4, MR-10, and OP-7) for which CLECs did not request Tier I classification, and which are not included in Tier I. Qwest

[28] Weiser, Phil. *Final Report and Recommendation*, 2001.

states that its Tier II classifications are appropriate. Tier II classifications are based on how results are reported and the importance of the measures to the CLECs.

174. Qwest states that the ranking (or weighting) of the performance measurements is based on the importance of the measures. This ranking is consistent with SBC's PAP in Texas. Qwest states that the CLECs have not proposed alternative ranking for measurements.

175. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that all measures should be classified as Tier I and Tier II. WorldCom and Z-Tel state that ranking (or weighting) measures is subjective. The parties mention that the Michigan Public Service Commission gave a medium rank to all performance measures. It also doubled the Tier I and Tier II penalty amounts. WorldCom and Z-Tel state that the Colorado Draft Report identified areas of performance which are of particular CLEC concern: 1) interconnection, 2) customer switching, 3) collocation, and 4) provisioning of local loops. WorldCom and Z-Tel believe that the Commission can use this list in order to rank performance measures based on their importance to CLECs.

176. Qwest mentions penalty classification discussions in the ROC in its reply brief. Qwest presents the same proposal in the ROC here in this proceeding. Qwest changed the rank of the following Tier I measures to "High": OP-8, OP-13, MR-3, MR-5, and MR-6. CLECs accepted these changes. Qwest proposed to change the rank of the following Tier II measures to "Medium": OP-3, OP-4, OP-5, MR-7, and MR-8. CLECs did not accept these changes. However, the CLECs stated that they would agree if MR-3 and MR-5 were added to the list of Tier II measurements. Qwest stated that it would also agree to this condition.

177. For Tier II payments, Qwest has proposed a variety of changes. Qwest proposes that three month consecutive failures are not necessary for the following measurements: GA-1, GA-2, GA-3, GA-4, GA-6, OP-2, MR-2, and PO-1. Also, the PO-1 sub-measurements would be grouped into two GUI and EDI sub-measurements. Qwest offered to implement a new payment schedule outlined in its reply brief.

178. WorldCom restates in its reply brief that all Tier I measures should also be Tier II measures, except for GA measures.

179. Qwest does mention this issue in its filing on the ROC proceeding. Qwest states that staff members of the public utility commissions of the states represented in the ROC proceeding requested that Tier I payments be increased while lowering Tier II payments. Qwest responded to this request by increasing or decreasing the rank given to certain measures. Qwest increased the rank from medium to high for the following Tier I measures: OP-8, OP-13a, MR-3, MR-5, MR-6a, MR-6b, and MR-6c. Qwest decreased the rank from high to medium for the following Tier II measures: OP-3, OP-4, OP-5, OP-6, MR-7, and MR-8.

180. WorldCom discusses this issue in its filing on Qwest's ROC proposal. WorldCom believes that classifying and ranking performance measures is a subjective process, which it opposes. Instead, WorldCom suggests that all performance measurement be given the same rank. In this way, Qwest could not decide that some measures are more important since all would be equally important. WorldCom mentions that it approves of Qwest's ROC proposal to increase the ranking of OP-8, OP-13a, MR-3, MR-5, MR-6a, MR-6b, and MR-6c from medium to high. However, it opposes Qwest's proposal to decrease the rank of OP-3, OP-4, OP-5, OP-6, MR-7, and MR-8 from high to medium. WorldCom argues that measurement ranking is difficult as the importance of various measures may change over time. Also, it may be difficult to give one rank to a measure which contains sub-measurements with varying levels of importance.

b. <u>Discussion and Staff Recommendation</u>

181. In Staff's Proposed Findings of Fact and Conclusions of Law, the Commission Staff did not agree with the ROC proposal which required Qwest to shift penalty amounts from Tier II to Tier I. This would be done if Tier II measurements OP-3, OP-4, OP-5, OP-6, MR-7, and MR-8 were decreased from a high to medium ranking. Staff maintains that these measurements should continue to have a high ranking. Staff agrees with Qwest's proposal to raise the ranking of OP-8, OP-13a, MR-3, MR-5, MR-6a, MR-6b, and MR-6c from medium to high. Staff believes that Tier II payments are important because they further the primary aim of the 271 process: to increase competition for local telecommunications service in the State of Arizona. Tier II payments act as an incentive to Qwest when CLEC volumes are too low to generate significant Tier I payments.

182. Qwest did submit comments on this issue in response to Staff's initial report. Qwest disagreed with Staff's recommendation set forth in Staff's initial report. Qwest states that the offer made in the ROC proceeding was made based on recommendations from commission staff members participating in the ROC. Qwest asks that Staff's recommendation be changed to match Qwest's ROC proposal or that the measurements retain their original classifications.

183. Staff continues to support its prior recommendation. Staff notes that Qwest mentioned in its reply brief that its proposal was not fully accepted by all parties in the ROC. Qwest mentions in its comments that state commission staff members participating in the ROC stressed preference for the types of Tier I and Tier II changes illustrated in Qwest's proposal. However, the Arizona Commission was not part of that ROC proceeding and Staff does not support Qwest's proposal. It is understandable that various state commissions might approach these disputed issues in different ways. These differences do not indicate erratic policy making, but rather an attention to the specific and varied concerns of each state. Staff does not believe that the Arizona Commission should in any way be bound by decisions made in other state jurisdictions.

184. Also, Staff points out that Tier II measures in the ROC now have a harder trigger than those in Arizona (i.e., Tier II payments begin at month 2 not month 3). Thus, Qwest's straightforward comparisons between Arizona and the ROC on this issue are not appropriate. Staff believes that its initial recommendation does resolve this disputed issue, in spite of Qwest's unsupported claim to the contrary.

DISPUTED ISSUE NO. 10: Severity Factors (PAP – 10)

185. Severity factors refer to escalation of payment amounts based on the severity of a performance miss. For example, if Qwest is ten days late provisioning a service they would pay more than if they were only one day late. CLECs have advocated including a severity factor in the PAP. Qwest has opposed including a severity factor in the PAP.

a. **Summary of Qwest and CLEC Positions.**

186. Qwest filed comments on April 5, 2001, addressing this issue. They state that Tier I payments proposed in Qwest's PAP are sufficient to compensate CLECs. Any escalation of payments to CLECs without evidence from CLECs as to the nature and level of CLEC harm specifically due to missed standards at the sub-measurement level is inappropriate. Qwest states that every calculation of CLEC proposed payment formulae and their application to Qwest service levels have demonstrated that CLEC proposed payments are so high as to not be within any bound of reasonableness.[29]

187. WorldCom addressed this issue in its April 5, 2001, filing. Qwest's plan does not adequately take into account the severity of poor performance. WorldCom supports Z-Tel's proposal for increasing penalties for severity and duration.

188. WorldCom and Z-Tel jointly filed an opening brief on this issue. They state that Qwest's plan only picks out the number of customers harmed not the degree to which they received poorer service than retail customers. For example, there is a significant difference in missing the "Commitments Met" metric 88% of the time versus less than 50%. Also, additional penalties should be imposed when poor performance is industry wide. Severe or repeated non-conformance indicates that penalties are too low to incent parity performance.

189. Qwest does mention this issue in its filing on the ROC proceeding. Qwest proposes Table 6 as a solution to this impasse issue. As Qwest's performance further deviates from the standard set in the PAP, Qwest would make Tier II penalty payments. Qwest proposed this solution in the ROC proceeding and states that the CLECs in attendance agreed.

[29] See Qwest exhibit G which shows payment levels for missed installation commitments (OP-3) and installation intervals (OP-4).

Table 6: Qwest's Severity Factor ROC Proposal

Measure	Performance Relative to Benchmark Or Parity	Tier II Payment Per Month
GA-1, 2, 3, 4, 6[30]*	1% or lower	$1,000
	>1% to 3%	$10,000
	>3% to 5%	$20,000
	>5%	$30,000
PO-1[31]*	2 seconds or less	$1,000
	>2 seconds to 5 seconds	$5,000
	>5 seconds to 10 seconds	$10,000
	>10 seconds	$15,000
OP-2/MR-2[32]**	1% or lower	$1,000
	>1% to 3%	$5,000
	>3% to 5%	$10,000
	>5%	$15,000

*Performance relative to benchmark
**Performance relative to parity

190. WorldCom filed comments on this proposal filed by Qwest. WorldCom agreed to the changes made by Qwest in its ROC proposal. WorldCom also states that Qwest has agreed to provide Tier II payments for these measures each month, rather than after three months.

b. <u>Discussion and Staff Recommendation</u>

191. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that its approach to severity factors, with the above ROC proposal, is improved. Staff was concerned that the Table 6 performance measures are appropriately aggregated at the sub-measurement level. These sub-measures should be weighted based on their number of occurrences. Staff reviewed Qwest's updated weighting proposal and found it to be adequate. The PAP should explicitly state that these performance measures in Table 6 will be weighted according to their number of occurrences.

192. Additional severity factors are not necessary and may result in excessive CLEC reliance on penalty payments. If it is determined that the penalty levels are not high enough, then the issue of severity factors can be revisited at the six-month PAP review.

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[30] GA-1 measures "Gateway Availability IMA-GUI." GA-2 measures "Gateway Availability IMA-EDI." GA-3 measures "Gateway Availability EB-TA." GA-4 measures "System Availability EXACT." GA-6 measures "Gateway Availability GUI-Repair."
[31] PO-1 measures "Pre-Order/Order Response Times."
[32] OP-2 measures "Calls Answered Within Twenty Seconds – Interconnect Provisioning Center." MR-2 measures "Calls Answered Within Twenty Seconds – Interconnect Repair Center."

193. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom requests that Staff change its recommendation. WorldCom asks that its comments on penalty caps and escalation also be referenced here. The reasoning behind WorldCom's statements on those issues would apply here as well. Comments submitted in response to Staff's initial report did address this issue.

194. Staff continues to support its prior recommendation. Staff would also like to clarify its position on the issue of escalation for the measures listed in Table 6. As illustrated in Staff's Table 5, Staff believes that escalation for Tier II penalties is important. Staff's escalation proposal in Table 5 covers all Tier II measurements except those in Table 6. For the measures in Table 6, Staff proposes the escalation payments in Table 7 below.

Table 7: Staff's Proposed Tier II Penalty Payment Levels for Measurements in Table 6[33]

Measure	Performance Relative to Benchmark Or Parity	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
GA-1, 2, 3, 4, 6*	1% or lower	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500
	>1% to 3%	$10,000	$15,000	$20,000	$25,000	$30,000	$35,000
	>3% to 5%	$20,000	$25,000	$30,000	$35,000	$40,000	$45,000
	>5%	$30,000	$35,000	$40,000	$45,000	$50,000	$55,000
PO-1*	2 seconds or less	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500
	>2 seconds to 5 seconds	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000
	>5 seconds to 10 seconds	$10,000	$15,000	$20,000	$25,000	$30,000	$35,000
	>10 seconds	$15,000	$20,000	$25,000	$30,000	$35,000	$40,000
OP-2/MR-2**	1% or lower	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500
	>1% to 3%	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000
	>3% to 5%	$10,000	$15,000	$20,000	$25,000	$30,000	$35,000
	>5%	$15,000	$20,000	$25,000	$30,000	$35,000	$40,000

*Performance relative to benchmark
**Performance relative to parity

195. Staff will give an example of payments under Table 7 in order to describe how this table would be used. If Qwest missed PO-1 by more than 10 seconds, then Qwest would pay $15,000 in the first month. If in month two, Qwest again missed PO-1 by more than 10 seconds, then Qwest would pay $20,000 since this was the second consecutive month of missing PO-1 at that severity level. If in month three, Qwest missed PO-1, but by 7 seconds, then Qwest would pay $10,000 since this is the first month in which PO-1 was missed at that severity level. If in month four, Qwest met the benchmark for PO-1, then no penalty payment would be made. If in month five, Qwest again missed PO-1 by more than 10 seconds, then Qwest would pay $15,000 based on the concept of sticky duration explained in disputed issue number thirteen.[34]

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[33] This table does not apply to the measurements mentioned in Table 5 of this Staff Report. Table 7 includes the escalation payment levels for the measurements specified in Table 6.

[34] For the concept of sticky duration to enable payment levels to drop, Qwest would have to meet a *performance standard first*. For example, if in month four of the previous example, Qwest missed PO-1 by 3 seconds, then Qwest would pay $5,000 since this was the first time that this standard was not met. If in month five, Qwest again missed PO-1 by more than 10 seconds, then Qwest would pay $20,000. The

DISPUTED ISSUE NO. 11: Audits (PAP – 11)

196. Auditing Qwest's procedures and financial systems once it receives Section 271 approval was discussed. An audit of Qwest's procedures would involve review of the procedures used in calculating Qwest's performance measures in accordance with PAP guidelines. Qwest's financial systems would be reviewed to determine if penalty amounts are also calculated in accordance with PAP guidelines.

a. Summary of Qwest and CLEC Positions

197. Qwest provided comments on this issue in its April 5, 2001, filing. Qwest proposes that an ongoing monitoring program of the PIDs be adopted in lieu of the comprehensive annual audit proposed by the CLECs. An audit of Qwest's financial systems would be initiated after one year of operation under the PAP. Another financial audit would begin no later than 18 months following the initiation of the first audit. For all audits, Qwest would choose the auditor or the Commission may conduct the audit. Qwest would cover the costs of the audits.

198. In instances of reporting or payment disagreements between Qwest and CLECs, an independent audit may be conducted. Any under or overpayments would be corrected following the audits. Interest on the payments would be calculated at the one year U.S. Treasury rate. Also, the party which is found responsible for payment deficiencies must cover the expense the auditor incurred in conducting the audit. The issue in question must also be less than twelve months old when the audit begins. Each CLEC can request a maximum of two PIDs be investigated per audit. CLECs are limited to two audits per calendar year.

199. Monitoring would be combined with these audit provisions. Additional monitoring would be focused on key areas which were identified in the initial audit as requiring further monitoring.

200. WorldCom filed comments on this issue on April 5, 2001. WorldCom states that periodic and comprehensive third-party audits of Qwest's reporting procedures and reportable data is necessary to ensure accurate and reliable data. The audits should validate that all systems, methods, and procedures for reporting performance measures are consistent with the business rules, methods of calculation, reporting structures, disagreggation, and measurable standards of the PIDs. WorldCom proposes an initial comprehensive audit that will commence six months after the ROC OSS test ends. Additional audits would then be conducted every twelve months. WorldCom proposes the following guidelines for audits:

- The cost of these audits will be born by Qwest.

payment level would not be escalated to $25,000 because Qwest did not miss the measure by more than 10 seconds for three consecutive months. Also, Qwest would not experience the falling of payment levels to $15,000 because Qwest did not pass the measure in the previous month.

- An independent third-party auditor (selected jointly by Qwest, the Commission, and the CLECs) will perform the audit. The audit process will be open to the CLECs. When the audit is completed, the results of the audit will be submitted to the Commission and sent to the CLECs.
- If the audit finds that Qwest is not reporting accurately, consequences should ensue including placing Qwest's 271 approval on hold until it proves it has permanently fixed the problem.

201. In addition to the regular annual audits, additional audits could be triggered by recommendations from the previous auditor, by the Commission staff, or by a CLEC request for a mini audit. Penalties should be imposed if the auditor cannot replicate a measure because of missing data.

202. WorldCom and Z-Tel jointly filed an opening brief on this issue. They refer to the five-step process laid out in the Colorado Draft PAP Report. Under the Colorado Plan, for the first three years of the auditing program, Qwest should pay for the first three aspects of this audit process described below. After the three years, the Commission can decide whether Qwest should bear full financial costs for future annual audits based on the results of past audits and the current competitive state of the Arizona market. The fourth and fifth aspects of the audit process address mini-audits and Commission audits. WorldCom and Z-Tel add a sixth element for a requirement that Qwest adopt a change management plan for metrics so that auditors and CLECs can follow changes in metrics from month to month for accurate replication. At the PAP's inception, and every year thereafter, the Arizona Corporation Commission, with input from its Staff, Qwest and CLECs, should select an appropriate outside firm to perform the auditing function. The five step process is summarized below.

(1) Basic Requirements Imposed on Qwest

> Qwest must not be authorized to make any change in its performance measurement and reporting system unless the Commission, through the PAP Revision Process or otherwise, approves of such a procedure in advance. In addition, to facilitate the use of effective auditing of Qwest's performance measurement system, Qwest should be required to store all such records in easy-to-access electronic form for three years after they have been produced (and an additional three years in an archived format). Any failure to follow either of these requirements shall be treated as a violation of the Change Management Procedure and would result in penalties. The auditor should be empowered to go beyond checking Qwest's calculations and adherence to business rules, but to also ensure that the underlying data was properly coded so that exclusions are appropriate.

(2) Oversight of Initial Problem Areas

> During the first two years following the institution of the PAP (starting with the first generation of the performance reports called for by the PAP), Qwest shall be subject to periodic specialized audits. These audits would focus on areas

of performance that were identified in the initial audit. Any issues identified by the auditor must be corrected by Qwest to the satisfaction of the auditor and the Commission before the audit is closed. Additionally, any future audits may include "areas of performance" not "identified" in the initial performance measurement audit.

(3) Regular Performance Management Audits on Selected Measures

At annual intervals for the first three years of the PAP's operation, and at intervals to be determined by the Commission thereafter, the outside auditor shall perform an audit that will entail three basic steps. First, this audit should evaluate the accuracy of the measures. Second, the audit should examine the measures responsible for producing 80% of the penalties paid by Qwest over the prior interval. Finally, the audit should take particular care in evaluating whether Qwest is accurately evaluating which, if any, requests for performance can be properly excluded and thus not counted toward its wholesale performance requirements. To facilitate this exercise, Qwest shall be required to keep a record of all exclusions (whether authorized by the PIDs or otherwise excluded) and to catalog the effect of such exclusions on otherwise applicable penalty calculations. Such records should be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

(4) Mini-audits Upon CLEC Request

CLECs can request a "mini-audit" of Qwest's wholesale measurement systems. This mini-audit must be conducted by a third-party auditor. Qwest should pay for fifty percent of the costs of the mini-audits. The other fifty percent of the costs will be divided among the CLEC(s) requesting the mini-audit, unless Qwest is found to be "materially" misreporting data, "materially" misrepresenting data, or to have non-compliant procedures. If any of these apply, then Qwest should pay for the entire cost of the third-party auditor. "Materially" at fault means that a reported successful measure changes as a consequence of the audit to a missed measure, or there is a change from an ordinary missed measure to a higher severity level. Each party to the mini-audit should bear its own internal costs, regardless of which party ultimately bears the costs of the third-party auditor. In addition to fixing the identified problems, Qwest should also be responsible for paying a penalty under the change management process.

When a CLEC has reason to believe that the data collected for a measure is flawed or the reporting criteria for the measure is not being followed, it must have the right to have a mini-audit performed on the specific measure/sub-measure upon written request (including e-mail). This request will include the designation of a CLEC representative to engage in discussions with Qwest about the requested mini-audit. If, thirty days after the CLEC's written request, the CLEC believes that the issue has not been resolved to its satisfaction, the CLEC may commence the mini-audit, after providing Qwest with written notice five business days in advance.

Each CLEC should be limited to auditing three single measures/sub-measures or one domain area (preorder, ordering, provisioning, maintenance, or billing) during an audit year. Mini-audits cannot be requested by a CLEC while the OSS third-party test or an annual audit is being conducted (i.e. before completion of the complete test). Mini-audits should include two months of raw data. No more than three mini-audits should be conducted simultaneously. If, during a mini-audit, it is found that for more than thirty percent of the measures in a major service category Qwest is "materially" at fault, the entire service category should be re-audited at Qwest's expense.

The results of each mini-audit should be submitted to the CLEC involved and to the Commission as a confidential document. Qwest should provide notification to all CLECs of any mini-audit requested when the request for the audit is made on its website or by other means.

(5) Commission Audits

The Commission should retain the right to perform an audit, with the assistance of the outside auditor, if the Commission so chooses to examine any aspect of Qwest's wholesale performance at any time that it deems warranted. Such an audit should be paid for through Tier II penalties maintained in a state fund. If the audit discovers errors in performance reporting that are adverse to the CLECs, Qwest should reimburse any costs of the audit and be liable for penalties under the change management process.

(6) Change Management Process

Qwest should adopt a change management process with input from CLECs to ensure that metrics can be replicated by the auditor. The change record would cover all elements of a metric. This process should be enforced by Commission directive that states that the auditor's inability to replicate a metric due to poor change control or missing data should elicit the same remedy as if the metric had been missed. This would include duration remedies if multiple months cannot be replicated.

203. WorldCom's reply brief states that in order for an audit process to be meaningful, Qwest must not be allowed to select the auditor. The Commission should have the ability to initiate an audit if it finds that Qwest is not properly complying with the PAP. Depending on the trigger the Commission uses, Commission audits will impact the need for root cause analysis. As laid out in the opening brief, the CLECs should have the right to mini-audits. The Commission should determine who pays for the mini-audits. If a CLEC is abusing the mini-audit process, it should be assessed the cost of the audit.

204. Qwest did not comment on this issue in its filing on the ROC proceeding. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. <u>Discussion and Staff Recommendation</u>

205. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff stated that auditing Qwest's procedures is important. Tier II payments as described in the next disputed issue could help fund this effort. Staff believed that Qwest's monitoring proposal was sufficient especially in light of the six-month review efforts which will be conducted. The CLEC auditing proposal would be too onerous an effort. However, Staff believed that the Commission rather than Qwest should choose the auditor (or monitor) of Qwest. The Commission should also be able to conduct an audit or have one conducted at any time it deems necessary. In an audit or monitoring program, the results should be provided to Qwest, the Commission, and all CLECs.

206. Qwest did submit comments on this issue in response to Staff's initial report. Qwest did support much of Staff's recommendation on this issue. Qwest also mentions that it has agreed to a multi-state audit/monitoring program. Qwest states that it would be beneficial for Arizona to be involved in a multi-state audit effort. Staff initially recommended that the Commission be allowed to conduct audits at "any time." Qwest is opposed to this part of Staff's recommendation.

207. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom disagrees with Staff's audit recommendation in that its scope is too limited. WorldCom asks that Staff review the recommendations in other states (such as Colorado and Utah) which developed more meaningful audit provisions.

208. Staff supports its prior recommendation with some clarifications. Staff reiterates that the choice of auditor should be made by the Commission. Staff is not opposed to the Arizona Commission joining in a multi-state audit effort if the terms of the auditing procedures are deemed favorable by the Commission. However, the Commission should always reserve the right to leave a multi-state audit effort if the audit methods do not meet Arizona's auditing needs, or to conduct its own audit at any time. Given that the Commission has not been a part of the multi-state proceeding, Staff is not even aware of how the multi-state participants plan to select an auditor. Staff would not oppose joining the multi-state audit process if it is determined that it will meet Arizona's needs. However, again participation in any multi-state auditing effort still should not preclude Arizona in ordering and conducting its own audits if necessary or found to be warranted. One condition that Staff believes is essential is that the auditing process be open to the CLECs; Staff could only recommend joining the multi-state process if that process is open. The Staff will review the PAP auditing provisions in its six-month reviews.

DISPUTED ISSUE NO. 12: Tier II Payments (PAP – 12)

209. Since Tier II penalty payments will not be received by CLECs, parties have suggested how to utilize the Tier II payments collected under the PAP.

a. Summary of Qwest and CLEC Positions

210. Qwest states its position on Tier II payments in its opening brief. Qwest states that its Tier II proposal is sufficient to encourage compliance and not provide windfall payments to CLECs. Qwest states that Tier II payments would be used to extend telephone service in Qwest's territory and to extend Qwest's service territory into new areas. Qwest states that payment levels under the CLECs proposal for Tier II payments would be unreasonable. Qwest states that its proposed Tier II changes as mentioned in its reply brief on penalty classification addresses CLEC concerns.

211. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that Qwest should not receive Tier II payments or be allowed to benefit from these payments to the State of Arizona. Tier II payments can be received by the State of Arizona or the Commission for administering the PAP and to audit PAP processes. WorldCom and Z-Tel state that it is not appropriate that Tier I measurements are evaluated every month, but Tier II measurements are evaluated every three months. WorldCom and Z-Tel believe that all performance measurements should be classified as Tier II, except those GA measures to which CLECs have agreed.

212. WorldCom restates in its reply brief that all measurements (except GA measurements) should be classified as Tier II.

213. Qwest maintains that Tier II payments revert to Qwest for usage that relates to its service territory.

214. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. Discussion and Staff Recommendation

215. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with the CLECs in that the Tier II payments should not revert solely to Qwest for its personal use. Tier II payments should further the aim of increased competition in Arizona's telecommunications market.

216. Staff recommends that funds collected through Tier II payments should be used to fund certain Commission activities. The Commission activities funded should include and be limited to: 1) covering the additional costs of administering the PAP and 2) covering the costs of developing permanent wholesale service quality standards. Both of the above may include the costs of utilizing consultants. Staff recommends that if Tier

II payments exceed what is necessary to cover the above two costs, the balance should be given to the Arizona State Government's general fund.

217. Qwest's contention that Tier II payments be used to extend Qwest's service territory into new areas directly contradicts their current policy of resisting such expansions. Also, returning the payments to Qwest will diminish any incentives those payments may have on changing Qwest's performance.

218. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom points out that issues previously mentioned by WorldCom were not addressed by the Commission. WorldCom believes that there should not be a three month trigger for Tier II payments. For Tier II measures that have Tier I penalties as well, payments should begin after two consecutive months of non-compliance. Also, both Tier II and Tier I payments should escalate over time.

219. Qwest did submit comments on this issue in response to Staff's initial report. Qwest indicated that they were strongly opposed to Staff's proposed resolution of how Tier II payments should be used.

220. Staff agrees with WorldCom that Tier II payments should also escalate. Staff's Tier II escalation proposal is illustrated in Tables 5 and 7. Staff does not agree with WorldCom's suggestion that payments on measures with Tier I and Tier II penalties should begin in the second consecutive month of non-compliance. Staff notes that the measures listed in Table 7 would have payments begin in the very first month of non-compliance. Staff believes that the three month trigger on most measures plus the more stringent requirements of Table 7 are sufficient to ensure Qwest's compliance. Staff also can review this recommendation in the PAP six-month review.

221. Qwest was strongly opposed to Staff's initial recommendation on this issue. However, the resolution outlined above is considerably different than that in Staff's initial report. Staff continues to support use of at least of a portion of payments to the Tier II fund to be used to enable the Commission to administer the PAP on an ongoing basis. Staff's initial report identified those uses as follows: 1) audits of the PAP by the Commission as necessary, 2) retention of additional Staff and/or consultants to monitor post-entry compliance and 3) dispute resolution. In addition, Staff believes that it would be appropriate to utilize such funds as needed to encourage improvements to Qwest's wholesale service quality in both federal and state proceedings. Staff still can not support Qwest's proposal to have the Tier II penalties returned to it.

DISPUTED ISSUE NO. 13: Sticky Duration (PAP – 13)

222. The term "sticky duration" refers to escalated penalty levels (i.e., amounts) "sticking" in place until a certain time at which Qwest is deemed to merit penalty level reductions to initial levels. Qwest is opposed to sticky duration while the CLECs are in favor of this concept.

a. <u>Summary of Qwest and CLEC Comments</u>

223. Qwest states its stance on the issue of "sticky duration" in its opening brief. Qwest believes that the issue is composed of two parts: 1) whether two months compliance is sufficient for penalty levels to return to initial amounts; and 2) whether repetition of a previous offense should require higher than initial penalty amounts.

224. Qwest mentions that Z-Tel proposes "sticky duration" in which repeated failures are perceived as demonstrating the need for higher penalty levels. Qwest states that this has not been proven in the telecommunications industry. Qwest also states that no FCC approved PAPs include this provision. Qwest states that it might not be the cause of a failure and that a failure does not indicate discrimination toward CLECs by Qwest. Qwest also believes that it is uneconomical for it to provide perfect service to CLECs, yet that is what "sticky duration" requires of Qwest. Qwest believes that since new services or service upgrades can result in a temporary decline in service quality, that the incentive for Qwest to implement needed changes to its systems may be eroded by "sticky duration."

225. WorldCom and Z-Tel jointly filed an opening brief on this issue. The parties state that severity and duration factors provide necessary incentives to improve Qwest performance. WorldCom and Z-Tel believe that two or three months of compliant Qwest performance is necessary before allowing payment levels to return to initial levels.

226. Qwest mentions a ROC proposal to address this issue in its reply brief. In the ROC proposal, Qwest agreed to a specific concept of "sticky duration." Qwest refers to the table below in its proposed PAP as the method by which penalty payments will be increased and decreased. Payment levels will be increased as consecutive month misses accumulate according to Table 8. If Qwest does meet a measurement, then penalty payment levels will revert downward one month after compliance for one month. For example, if there are four consecutive months of failures in one measure, then Qwest would be responsible for penalty payments at the month four level in Table 8. If in the next month, Qwest meets the measurement standard, then the payment amount is zero. If in the following month after this compliant performance, Qwest fails on the measurement, then the penalty payment level would be at the month three level.

Table 8: Qwest Tier I Penalty Payment Levels

Per Occurrence						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$150	$250	$500	$600	$700	$800
Medium	$75	$150	$300	$400	$500	$600
Low	$25	$50	$100	$200	$300	$400

Per Measure/Cap						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000
Low	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000

227. In summary, Qwest payment levels do not reduce to the initial levels on merely one month of compliant performance. However, after demonstrated commitments to meeting the measurement standards, then the penalty payment levels would eventually return to initial levels. Qwest makes this same proposal here in the Arizona proceeding.

228. WorldCom agrees with Qwest's proposal to have payment levels adjusted downward one month after compliance for one month.

229. Qwest restated its position on this issue in its filing on the ROC collaborative.

230. WorldCom refers to the concept of "sticky duration" in its filing responding to Qwest's ROC proposal. WorldCom restates its reply brief response. WorldCom mentions that there is a drop in the percentage increase in the Tier I payments past month three. Under Qwest's Tier II proposal, Qwest would make the same payment amount each month, even after months of non-compliant behavior. WorldCom "still has issues with the payment table itself."

b. Discussion and Staff Recommendation

231. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest's proposal on sticky duration. As discussed in the section on disputed issue number 7, Staff disagreed with the CLECs that the payment levels should escalate beyond the sixth month. Staff supported Qwest's payment table as presented in Table 8, which indicated that penalties for month six and thereafter be equalized.

232. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom opposes the limit of six months on payment escalation which is part of Staff's recommendation on the issue of sticky duration.

233. Staff disagrees with WorldCom's recommendation that penalties escalate beyond six months. This issue can be revisited in the PAP six-month review if it seems that Qwest does not have the incentive to comply with the current limit of six months on escalation.

234. Staff continues to support its initial recommendation and also provides clarification of its recommendation. Staff supports sticky duration for Tier II payments as well. Tables 5 and 7 illustrate the escalation levels which would apply to Tier II payments. Staff recommends that the same sticky duration concept expressed by Qwest for Tier I payments, would apply to Tier II payments.

DISPUTED ISSUE NO. 14: Plan Limitations (PAP – 14)

235. Section 13 of Qwest's proposed PAP contains several legal limitations on or associated with the PAP.

236. Section 13.1 states that the PAP will not go into effect until after Qwest receives approval of its 271 application with the FCC. The CLECs oppose this provision and want the PAP to go into effect at the time the Commission approves it, regardless of the status of Qwest's application with the FCC. Qwest is not willing to concede on this issue.

237. Section 13.2 states that Qwest will not be liable for Tier I damages to a specific CLEC until the Commission approves an interconnection agreement, which incorporates the PAP, between Qwest and that CLEC. The CLECs generally oppose this requirement. CLECs believe that they should be able to opt into the PAP as soon as the Commission approves the PAP. They do not want to go through the process of amending their interconnection agreements.

238. Section 13.3 indicates that PAP penalties will not be paid if measurements were missed due to force majeure events. The CLECs initially claimed that Qwest's definition of force majeure was too vague.

239. Section 13.4 states that the fact that Qwest made payments under the PAP cannot be used by CLECs as evidence in other proceedings that Qwest is discriminating against them. This is commonly referred to as the "liquidated damage" provision. The CLECs oppose this provision.

240. Section 13.5 states that actual damages from missed performance measures would be difficult to ascertain. Thus, the payments made under the PAP (the "liquidated damages") are a reasonable approximation for contractual damages. Section 13.5 also states that payments under the PAP are not intended to be a penalty. These PAP payments do not foreclose any non-contractual legal or regulatory claims and remedies that may be available to CLECs. The CLECs oppose the provisions of Section 13.5.

241. Section 13.6 states that CLECs are not entitled to receive payments from both the PAP and any other rules, orders, or other contracts (such as interconnection agreements) that cover payments for the same or analogous performance as the PAP. If CLECs have alternatives to the PAP available, they must choose between the PAP and the available alternatives. The CLECs claim that the language referring to analogous performance in 13.6 is too broad.

242. Section 13.7 states that Qwest will not be liable for both Tier II payments and other assessments or sanctions by the Commission that cover the same or analogous performance. The CLECs claim that the language referring to analogous performance in 13.7 is too broad.

a. <u>Summary of Qwest and CLEC Positions</u>

243. Qwest filed comments on this issue on April 5, 2001, and in its opening brief. Qwest states that the provision in Section 13.1 that the PAP not become effective until after Qwest receives 271 approval from the FCC is appropriate. Qwest states that "the FCC has clearly stated that the purpose of a performance assurance plan is to prevent backsliding once the RBOC obtains approval…"[35] The rational behind a PAP is that a RBOC's incentive to engage in market opening behavior exists before, but not after, approval.

244. Qwest states that the CLEC's opposition to Section 13.2 is unfounded. The FCC orders for Kansas, Oklahoma, and Texas indicate that the PAP is part of standard interconnection agreements in those states.

245. Qwest states that Section 13.3 simply disallows double payments for the same performance. Qwest claims that this is consistent with statements made by the FCC in the Massachusetts order.[36]

246. Qwest states that adopting the PAP essentially deprives CLECs of their constitutional due process rights. Therefore, it is appropriate for Section 13.4 to prohibit the use of performance results or payments under the plan as an admission of discrimination or of Qwest's liability for claims brought outside of the PAP. Qwest claims that this provision is based on language from the SBC Texas PAP approved by the FCC for Texas, Oklahoma, and Kansas.

247. Qwest indicates that Section 13.5 simply states that payments under the PAP are "liquidated damages." "(T)he payment amounts are unquestionable estimates, and the intent of the plan is to have Qwest make the payments without actual proof of harm incurred." "(L)iquidated damages are a means by which the parties, in advance of a breach, fix the amount of damages that will result therefrom and agree upon its payment." Qwest claims that the CLECs objection to Section 13.5 stems from their desire to take advantage of the PAP's self-executing liquidated damage payments and then litigate for the actual damages. Qwest believes that "the reservation of a right to sue for actual damages renders the liquidated damages unenforceable."

248. Qwest states that Sections 13.6 and 13.7 are totally appropriate and simply preclude Qwest from paying two penalties for the same performance miss.

249. WorldCom filed comments on this issue in its filing on April 5, 2001. WorldCom and Z-Tel jointly filed an opening brief discussing this issue. WorldCom and Z-Tel object to many of the limitations in Section 13 and refer to them as loopholes. They object to Section 13.1 because instituting the PAP before FCC approval will allow the Commission to evaluate the effectiveness of the PAP. They object to the limitations in Section 13.2. They believe that CLECs should be able to opt into the PAP under Section 1.8 of the SGAT immediately upon approval of the PAP by the Commission.

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[35] Qwest cites the Verizon Massachusetts Order Paragraph 236-7, and 240

[36] Qwest cites the Verizon Massachusetts Order Paragraph 242

250. WorldCom/Z-Tel believe that the force majeure language in Section 13.3 is too vague. They indicate that there currently is language in the SGAT that defines force majeure events (SGAT Section 5.7). This existing SGAT language should be used in the PAP as well.

251. WorldCom/Z-Tel also take issue with Section 13.4 of the PAP. They state that Qwest's conduct underlying its performance, including its performance results, is discoverable and may be admissible as evidence. Qwest is free to contest the evidence, but it cannot bar it from being introduced. WorldCom and Z-Tel also state that Section 13.4 is vague and needs further clarification.

252. In relation to both Sections 13.4 and 13.5, WorldCom and Z-Tel indicate that PAP payments are not "liquidated damages." Therefore, the reference to liquidated damages should be deleted.

253. WorldCom and Z-Tel object to Sections 13.6 and 13.7 because they do not believe that any court would allow for double recovery. They also state that they would not seek double recovery. That is, any PAP penalty payments Qwest makes would be netted out of any other damages the CLECs could potentially receive. They point out that restrictions on double recovery should only apply to double recovery for the same acts. Qwest's restriction against double recovery for "analogous" wholesale performance is too vague.

254. WorldCom and Z-Tel believe that both Sections 13.8 and 13.9 should be deleted.

255. Qwest filed a reply brief on this issue. Qwest does not change its position outlined in its opening brief. Qwest clarifies that Section 13.4 does not limit "...the introduction of performance results into evidence in another proceeding, if appropriate."

256. Qwest believes that the position of WorldCom and Z-Tel that Sections 13.6 and 13.7 are too broad and overly restrictive is vague and unsupported.

257. WorldCom filed a reply brief on this issue. WorldCom requests that the Commission adopt a "memory" concept if the Commission does not choose to make the PAP effective before the FCC grants Qwest 271 approval. WorldCom believes that if 1) Qwest has missed a measure for three consecutive months prior to the PAP being in effect and 2) misses that measure again in the first month that the PAP is effective, then that measure should be treated as if Qwest has missed it four months in a row. The appropriate escalated penalties should then apply.

258. WorldCom indicates that CLECs should not be entitled to double recovery for the same violation. However, Qwest's restrictions on payments for analogous activity are too broad and will result in disputes over what constitutes analogous activity.

259. Qwest did address this issue in its filing on the ROC collaborative. In this filing, Qwest proposes a definition of force majeure (to be inserted in to Section 13.3) that is similar, but not identical to the definition WorldCom advocated in its opening brief.

260 WorldCom does address this issue in its filing on Qwest's ROC proposal. WorldCom states that Section 13.3 should include either the language in the SGAT Section 5.7.1 or this language should be cross-referenced. The language on force majeure in Section 13.3 should be limited to only benchmark standards and should not apply to parity measures. WorldCom states that the force majeure language in the Colorado final PAP report[37] is more appropriate. It is not as general as the language Qwest provided in this proceeding. WorldCom would like the following language added to Section 13:

> "If Qwest desires a waiver of its obligation to pay any penalties it must file an application with the Commission. Any waiver request must, by a preponderance of the evidence, establish the circumstances that justify the waiver, stating any and all relevant documentation to support the request. CLECs and other interested parties would have a full opportunity to respond to any such waiver request prior to the Commission ruling. Qwest shall be required to pay any disputed amounts or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. In addition, any such waiver should only apply to a narrow period of time when the activity occurred, not months after the activity or has ended."

261. WorldCom opposes the Section 16.0 changes proposed by Qwest. WorldCom does not support Qwest changes which indicate that Qwest may be able to have the final say on PAP changes.

b. <u>Discussion and Staff Recommendation</u>

262. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest's position on Section 13.1. Staff believed that the effective date of the PAP should follow FCC 271 approval.

263. Staff disagreed with Qwest's position on Section 13.2. Staff supported the CLECs desire to opt into the PAP as soon as it goes into effect. An amendment to a CLECs current interconnection agreement should not be necessary. The Arizona OSS test has documented that obtaining an amendment to an interconnection agreement can be a lengthy and difficult process (see AZ IWOs 1130, 1132, and 1134).

264. Staff supported Qwest's inclusion of Section 13.3 force majeure language that corresponds to the language in the SGAT for measures with a benchmark standard. However, if Qwest misses a measurement with a parity standard, then Qwest should not

[37] Weiser, Phil. *Final Report and Recommendation*, 2001.

be forgiven for these Tier I or Tier II misses. Staff believed that the PAP should clarify that resumption of the PAP will occur in the month following a force majeure event.

265. Staff supported Qwest's position on admission of liability stated in Section 13.4. This is the same language as is in the Texas PAP.

266. Staff supported Qwest's position on liquidated damages stated in Section 13.5. This is the same language as is in the Texas PAP.

267. Staff supported the CLEC position on payment entitlements stated in Section 13.6. A similar section to 13.6 does not exist in the Texas PAP. Staff opposed the inclusion of Section 13.6 in the PAP. Staff was especially against the inclusion of the vague reference to "same or analogous" performance.

268. Staff supported the CLEC position that the Section 13.7 language referring to "analogous performance" is too broad. Currently, Qwest's Section 13.7 reads:

> "Qwest shall not be liable for both Tier II payments and assessments or sanctions made for the *same or analogous performance* pursuant to any Commission order or service quality rules." (Italics added.)
>
> The same section as presented in the FCC approved Texas PAP for SBC reads:
>
> "SWBT shall not be liable for both Tier II "assessments" and any other assessments or sanctions under PURA or the Commission's service quality rules relating to the *same performance*." (Italics added.)

269. In addition, Staff believed that there is a valid distinction between PAP penalty payments and Commission performance standards. For most measurements under the PAP, Qwest is required to deliver parity performance or face penalties. However, Commission performance standards set retail/wholesale levels of performance. These retail/wholesale levels may be above Qwest's current level of performance (as utilized in computing parity performance). If Qwest does not meet these standards, then Qwest should be liable to penalties under both the PAP and any Commission performance standards.

270. Qwest should change the final sentence of the first paragraph in Section 16.0 to read: "Any changes to existing performance measurements and this PAP shall be by mutual agreement of the parties." This was the original sentence and was changed by Qwest in its latest submission of the PAP. The Commission should also be able to make changes to the PAP without Qwest approval.

271. Qwest did submit comments on this issue in response to Staff's initial report. With respect to Section 13.7 Qwest proposes that the term "same underlying activity or omission" be used instead of Staff's proposed (and Texas' adopted) "same

performance." Qwest also indicates that if Staff is proposing to eliminate Section 13.7 they would oppose it.

272. Qwest states that Staff's position on this issue was one of the more troubling parts of Staff's initial report. Qwest states that changes made to the PAP should not be made without Qwest consent. Staff's recommendation on disputed issue 16 contrasted to Staff's position on PAP changes in issue 14. In issue 16, Staff stated that mutual consent of the parties was required for PAP changes. Qwest states that federal law does not support the Staff's recommendation that changes to the PAP can be made without Qwest's consent. Qwest proposes an approach to this issue which was developed in the multi-state proceeding. This approach is outlined in the following language which would be included in Section 16.0 of the PAP:

> "Changes shall not be made without Qwest's agreement, except that disputes as to whether new performance measurements should be added shall be resolved by one arbitration proceeding conducted pursuant to Section 5.18.3 of the SGAT, which shall bind CLEC and Qwest and all parties to the arbitration and determine what new measures, if any, should be included in Exhibit K to the SGAT..."

273. Qwest proposes to require CLECs to file for approval of PAP amended interconnection agreements prior to opting into the PAP. These agreements need only be filed with the Commission (and do not need to be approved) in order for CLECs to opt into the PAP. Qwest also recommends that it begin supplying performance data to the Commission once the FCC has issued §271 approval, rather than starting on March 2001 since this date has passed.

274. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom requests that Staff require Qwest to begin supplying performance data to the Commission and to CLECs. WorldCom states that the multi-state QPAP report reads: "The QPAP should therefore require Qwest to provide monthly reports as if the QPAP had become effective on October 1, 2001." In Colorado, the Hearing Commissioner asked that Qwest provide monthly performance reports within 60 days of the Colorado commission's approval of the CPAP. The method of reporting and the storage of Qwest's performance data was specified as well. WorldCom asks that the Commission request that Qwest add the following sentence to the PAP: "The Commission can modify the PAP without Qwest approval."

275. With respect to Section 13.7, Staff rejects Qwest's new proposed language ("same underlying activity or omission") and continues to recommend "same performance." Also, Staff clarifies its position by stating that Section 13.7 should not be removed from the PAP. The removal of Section 13.7 was never contemplated by Staff.

276. Staff would like to clarify that it will seek mutual consent on changes to the PAP. When mutual consent is not possible, the Commission will make the final recommendation. Staff agrees with WorldCom that Qwest add the following sentences to

the PAP at the end of the first paragraph of Section 16.0: "The Commission can modify the PAP without Qwest approval. However, the Commission will first seek mutual consent of the parties. In the event that mutual consent is not possible, the Commission will make the final recommendation on PAP changes." These sentences should replace the last sentence in the first paragraph of Section 16.0 which reads: "Any changes to existing performance measurements in this PAP shall not be made without Qwest's consent."[38]

277. Staff disagrees with Qwest's recommendation that an amended interconnection agreement be filed prior to a CLEC opting into the PAP. Staff continues to support its prior recommendation on this issue. Qwest indicated in its comments on Staff's initial report that it would be willing to begin making payments to a CLEC when an amended interconnection agreement is filed with the Commission, as opposed to when the Commission approves it. This proposal in no way addresses Staff's concern. Staff's concern is that the process of negotiating the amendment prior to it being filed with the Commission may be lengthy and burdensome for the CLECs. Staff would support including the PAP in interconnection agreements if Qwest would be willing to agree to the following:

1) Qwest must file standard language for the amendment that any and all CLECs can use that indicates that the CLEC is eligible for payments under the Arizona PAP. The language must be filed with the Commission at the time Qwest's modified PAP plan is filed. The language will be subject to Commission approval after parties have an opportunity to comment on it.

2) For any CLEC that indicates that they want to use the standard language, the CLEC shall be able to file the amendment to the interconnection agreement with the Commission for approval. The CLEC will be required to send notice to Qwest that they are opting into the standard language, but Qwest will not be required to take any action.

3) Qwest will begin making payments under the PAP when the amendment is filed with the Commission.

278. Staff also disagrees that Qwest begin supplying performance data and PAP calculations to the Commission and CLECs following §271 approval. Staff continues to recommend that Qwest supply monthly performance data to the parties prior to PAP approval. Qwest already supplies monthly performance data to the Commission. Staff asks that performance data results for all PIDs be supplied to the Commission and CLECs beginning with data from March 2001. This data should be supplied to CLECs within 30 days of the approval of the PAP by the Commission. Qwest should supply data in accordance with its reporting requirements as currently listed in Section 14.0 in the PAP. Qwest's initial performance data report should include monthly data for the last month for which data is available and all months between that month and March 2001, including March 2001. The data necessary to make these calculations exists in Qwest's systems

[38] Qwest PAP, revised July 3, 2001, page 21.

now. In order to budget for penalty payments and to identify performance areas that need to be improved, it would be advantageous to Qwest to make Staff's proposed historical calculations. Thus, Staff does not believe that our proposal is burdensome on Qwest. Also, Staff believes that the historical data will greatly enhance the effectiveness of the six-month review. Having the additional data that Staff's proposal would afford would give the participants in the six-month review much more data to work with. Additional data will allow for more informed decision making at the six-month review.

DISPUTED ISSUE NO. 15: Data Timeliness (PAP – 15)

279. The PAP penalties are calculated based on data Qwest collects and analyzes. At regular intervals "performance reports" are made available to the CLECs by Qwest. Each CLEC receives reports that detail Qwest's performance relative to that CLEC and a report detailing Qwest's performance for the CLEC community as a whole. (CLECs do not receive reports of Qwest's performance for other CLECs; performance reports for individual CLECs are considered to be highly confidential.)

280. Performance reports need to be created on a timely basis in order for any PAP penalties to be paid out on a timely basis. Also, performance reports need to be delivered to the CLECs on a timely basis in order for the CLECs to respond with any reconciliation issues in a timely fashion.

a. Summary of Qwest and CLEC Positions

281. Qwest does mention this issue in its filing on April 5, 2001. Qwest states in its opening brief that it believes that late reporting of monthly CLEC results will not cause CLECs harm. Qwest, however, has agreed to pay $500 to the State of Arizona, for each business day for which a report is past a grace period.

282. WorldCom mentions this issue in its filing on April 5, 2001. WorldCom asks that Qwest be liable for a $5000 payment to the State of Arizona for each day past the delivery due date of a report. WorldCom also states that if the reports provided to CLECs are incomplete or inaccurate, then Qwest would be liable for a $1000 payment to the state for each day past the initial due date. In the event that a CLEC cannot access the data on which reports are based, then Qwest would be liable for a $1000 payment to affected CLECs per day until this data is available. This payment would only be required if Qwest was responsible for the lack of CLEC access. Interest would accrue if Qwest does not provide payments by the due date. If reports are late, and Qwest pays associated penalties, Qwest would still be liable for penalties due to poor performance as evidenced in the reports.

283. Qwest maintains that the CLECs have not supported their contention that CLECs are harmed by late reporting. However, Qwest continues to commit to a penalty for late reporting.

284. Qwest did address this issue in its filing on the ROC collaborative. Qwest mentions that previous PAP versions omitted a due date on providing CLEC data to CLECs. Qwest will provide data by the last day of the month which follows the month for which data is available. Qwest also asks for a grace period of five business days. If Qwest does not comply, then it would make a $500 payment to the State of Arizona for each business day missed following the five day grace period.

285. WorldCom filed comments on Qwest's ROC proposal. WorldCom does not support Qwest's contention that its ROC proposed changes resolve this impasse issue. WorldCom restates its stance as outlined in its opening brief. WorldCom also states that Qwest's stance is not consistent with the Texas PAP. The Texas PAP contains the following guidelines on reports:

- If no reports are filed, $5,000 per day past due
- If incomplete reports are filed, $1,000 per day for each missing performance results

286. WorldCom also mentions the Colorado Final PAP Report. This report included a recommendation that Qwest pay interest at twice the one-year treasury rate if it provides late payments. This report also recommended that if reports are inaccurate, then Qwest should pay the applicable penalty to the affected CLEC(s) plus a penalty of fifty percent of the amount in question.

b. <u>Discussion and Staff Recommendation</u>

287. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with the data timeliness penalties as stated in the Texas PAP and supported by the CLECs.

288. Qwest did submit comments on this issue in response to Staff's initial report. Qwest recommends a $500 total payment to the Commission for each business day a report is past the grace period of five days. Qwest opposes Staff's recommendation which ostensibly eliminates the grace period. Qwest also opposes Staff's recommended late reporting penalties as excessive and states that they are not based on any alleged harm to the CLECs.

289. Staff continues to support its prior recommendation, with the clarification that the five day grace period for reporting should remain intact. Staff sees no reason to deviate from the penalty levels that have been in effect in Texas. In response to Qwest's statement that the penalty levels are excessive and that they are not based on any alleged harm to the CLECs, Staff is compelled to point out that the purpose of the PAP is to incent Qwest. It is not meant to compensate the CLECs for any alleged harm. Staff will review the reporting penalties in the six-month PAP review.

DISPUTED ISSUE NO. 16: A.R.S. §40-424 (PAP – 16)

290. The PAP is a method by which the Commission will be penalizing Qwest due to noncompliance. Arizona Statute 40-424, titled "Contempt of Corporation Commission; penalty," addresses the leveling of penalties by the Commission. Parties have varying concepts of how this statute applies to the PAP. Below is the text of this statute:

> A. If any corporation or person fails to observe or comply with any order, rule, or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission, be fined by the commission in an amount not less than one hundred nor more than five thousand dollars, which shall be recovered as penalties.
>
> B. The remedy prescribed by this article shall be cumulative.

291. Qwest responds to this issue in its opening brief. Qwest states that the Arizona Corporation Commission is unable to award monetary damages due to its non-judicial nature. Qwest states that unless Qwest agrees to the imposition of penalty payments, the Commission is unable to enforce payments under the PAP. Also, any payments imposed by the Commission cannot be made payable to the CLECs, but must be made to the State of Arizona.

292. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that the Arizona Corporation Commission is authorized to enforce PAP penalty payments through the Telecommunications Act of 1996. WorldCom and Z-Tel state that the Commission should be able to impose penalties without an Order unless needed as part of a dispute resolution process. Any Arizona statutes that may restrict the Commission's penalty enforcement powers (such as A.R.S. §40-424), are not applicable in this proceeding. However, A.R.S. §40-424 would enable the Commission to impose penalties on Qwest. These penalty payments would be received by the State of Arizona, not by the CLECs. WorldCom and Z-Tel also state that these payments would not be due to the penalty provisions in the PAP.

293. Qwest restates its stance on this issue in its reply brief. Qwest believes that it is only through its agreement to hold to the terms of the PAP, that the Arizona Corporation Commission has the ability to impose PAP penalties. According to A.R.S. §40-424, the Commission can force Qwest to make PAP penalty payments with Qwest's agreement. Qwest also states that federal authority to enforce penalty payments under the Telecommunications Act of 1996 is lacking. Qwest's consent is integral to the imposition of PAP penalty payments. Qwest states that the opening brief of WorldCom and Z-Tel agrees with Qwest that payments must be received by the State of Arizona and that the payments would not be due to the penalty provisions of the PAP.

b. Discussion and Staff Recommendation

294. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff supported the CLEC comments. Staff stated that the Commission is adopting this performance assurance plan under not only State law, but the Telecommunications Act of 1996 as well. Furthermore, the PAP is designed largely to ensure Qwest's continued compliance with the market opening requirements of the Federal Act and Section 271 of the Federal Act. Therefore, Staff did believe that the Commission has the authority to institute a PAP which imposes penalties in the event of Qwest's noncompliance.

295. Qwest did submit comments on this issue in response to Staff's initial report. Qwest states that without Qwest consent to the PAP penalties, all penalties must be made to the State of Arizona. The Commission is not legally able to mandate that Qwest make penalty payments directly to CLECs. Staff continues to support its prior recommendation. The Commission may require that Qwest make payments directly to CLECs absent Qwest's consent.

J. Verification of Compliance

296. The proposed PAP outlined herein will act to ensure continued compliance by Qwest Corporation with the Act's market opening measures after Qwest receives 271 authorization.[39] This is important since one factor the FCC examines in 271 applications, is whether there exists adequate measures or incentives for the BOC to continue to satisfy the requirements of section 271 after entering the long distance market. The FCC has previously stated that the existence of a satisfactory performance monitoring and enforcement plan is probative evidence that the BOC will continue to meet its section 271 obligations after such a grant of authority.

297. The Arizona PAP is modeled on the Texas plan, which the FCC has said would be effective in practice. *Bell Atlantic New York Order,* 15 FCC Rcd at 4166-67, para. 433. The Arizona PAP includes the five characteristics which the FCC considers to be substantial evidence of the effectiveness of any such plan: 1) the potential liability provides a meaningful and significant incentive to comply with the designated performance standards, 2) the plan contains clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; 3) the plan contains a reasonable structure that is designed to detect and sanction poor performance when it occurs; 4) the plan contains a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal, and

[39] This report rejects any suggestion that Qwest's implementation of a PAP is an option insofar as Section 271 compliance is concerned. As Ameritech recognized in 1997, without "`concrete, detailed performance standards and benchmarks for measuring Ameritech's compliance with its contractual obligations and impos[ing] penalties for noncompliance,' Ameritech's statutory nondiscrimination obligations are only `abstractions.'" In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, CC Docket No. 97-137, Evaluation of The United States Department of Justice, at 40 (June 25, 1997) (available at http://www.usdoj.gov/atr/public/comments/sec271/ameritech/1147.htm) (quoting Ameritech Brief at 85).

5) there exist reasonable assurances that the reported data are accurate. See, *SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 423.

298. Qwest has agreed to allow any and all CLECs operating within the State of Arizona to opt into the PAP, which will become a part of Qwest's SGAT.

299. Staff recommends the following additional conditions:

1) the PAP will become a part of Qwest's SGAT, and Qwest claims that its SGAT will be in effect for a period of three years only. The PAP should not automatically be terminated when/if the Commission approves Qwest withdrawing its SGAT in Arizona.

2) also, the performance data gathered by Qwest should be forwarded to the Commission for each month of data. Qwest should submit performance data, starting with March 2001, to the Commission.

3) the evaluation of the appropriateness of a proposed PAP should be performed within the context of the docket opened to evaluate Section 271 issues.

4) the proposed PAP's provisions, if embodied in a SGAT filed by Qwest and accepted by the Arizona Corporation Commission, will remain in force regardless of developments in other states unless the Commission rules otherwise.

300. Staff recommends that the Commission withhold final endorsement of Qwest's 271 application with the FCC until Qwest has filed a PAP that conforms with all of Staff's above recommendations and agrees to abide by the provisions of that PAP.

II. CONCLUSIONS OF LAW

1. 47 U.S.C. Section 271 contains the general terms and conditions for BOC entry into the interLATA market.

2. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Arizona Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide interLATA services originating in any of its in-region States (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. Section 271 (d)(3).

4. The Arizona Commission is a "State Commission" as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State Commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

6. In order to obtain Section 271 authorization, Qwest must, inter alia, meet the requirements of Section 271 (c)(2)(B), the Competitive Checklist.

7. The Commission's jurisdiction to adopt this PAP arises under both State and Federal Law to ensure Qwest's continued compliance with its section 271 obligations, including Competitive Checklist requirements, after it receives Section 271 authority from the FCC.

8. The PAP adopted herein provides the necessary assurances that the local market will remain open after Qwest receives Section 271 authorization.